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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-739

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner General Motors Corporation ("GM") prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals *en banc* (App. B, *infra*) is not yet reported. The panel opinion of the Court of Appeals (App. C, *infra*) is reported at 573 F.2d 936. No memorandum opinion of the District Court was issued. The reporter's transcript of proceedings of the District Court on June 28, 1977 (App. D, *infra*) contains the District Court's oral opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on September 7, 1978. This petition for certiorari was filed on November 3, 1978. Such filing was timely whether the applicable period is the 90 days prescribed by 28 U.S.C. § 2101(c) or the 30 days prescribed by Supreme Court Rule 22(2), since the latter period was extended until November 6, 1978, by order of Mr. Justice Stewart entered on September 27, 1978. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an attorney employed by the Internal Revenue Service with substantial prior agency involvement in a tax matter should be permitted to conduct a grand jury investigation of the same matter.

2. Whether a court of appeals lacks jurisdiction under 28 U.S.C. § 1292(b) to accept an interlocutory appeal of an order allowing such IRS lawyer to conduct this grand jury investigation when the appeal is certified by a district court and the grand jury proceeding is not stayed while the appeal is pending.

3. Whether an order denying a motion to disqualify counsel in a grand jury proceeding may be appealed under 28 U.S.C. § 1291 or reviewed under the All Writs Act, 28 U.S.C. § 1651.

STATUTES INVOLVED

This case involves the following statutes and rules of procedure, which are reprinted as Appendix A, *infra*.

A. Jurisdiction.

(1). 28 U.S.C. § 1292(b).
(2). 28 U.S.C. § 1291.
(3). 28 U.S.C. § 1651.

B. Who may conduct grand jury proceedings.

(1). Federal Rule of Criminal Procedure 6(d).
(2). Federal Rule of Criminal Procedure 54(c).
(3). 5 U.S.C. § 3106.
(4). 28 U.S.C. § 515.
(5). 28 U.S.C. § 543.
(6). 28 U.S.C. § 528.

STATEMENT

During the audit in 1975 of GM's 1972 federal income tax return, GM agreed at the request of the IRS to conduct a survey to produce an estimate of the amount of expense materials (such as supplies, tools and machinery repair parts) which were on hand and unused but not reported in an inventory account. When the results of the survey indicated a lower amount than expected by the Revenue Agents, the agents began a series of visits to GM plants. These visits were punctuated by singularly abusive tactics and improper behavior on the part of some of the agents, such as berating GM employees who helped conduct the survey, refusing to listen to or accept good faith explanations by GM employees, and openly accusing GM employees of bad faith and of falsifying the survey.[1] In July 1976, shortly after GM protested these practices, the Revenue Agents broke off all contact with GM and referred the matter to the Intelligence Division of the IRS, which conducts joint civil and criminal tax investigations.

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1. Representative examples of these abuses were presented to the District Director and the Regional Commissioner of the IRS, then to the District Court, in the form of 23 affidavits signed by various GM employees. The affidavits are part of the record in this case. To date the IRS has never fully investigated the allegations of misconduct.

The Intelligence Division never conducted an investigation using the statutory powers which are available to it. Instead, in December 1976, Meno W. Piliaris, an attorney employed by the Office of Regional Counsel of the IRS, which had the responsibility for legal advice to the IRS with respect to GM tax matters, prepared a letter to the Department of Justice recommending that a grand jury investigation of GM and its employees be instituted. In that letter Mr. Piliaris stated the intention of the IRS to obtain the grand jury information for civil purposes:

> At the appropriate time we will request that an order be sought from the Court authorizing the disclosure of grand jury information to IRS under the provisions of Rule 6(e) of the Federal Rules of Criminal Procedure. [App. D-7.]

The Department of Justice accepted the referral. GM subsequently learned that the referral to the Department by the IRS was pursuant to a provision of the Internal Revenue Manual, Section 9267.4, which described extensive IRS participation in investigative (as opposed to accusatory) grand jury proceedings.

In April 1977, Special Agents of the IRS served numerous grand jury subpoenas on GM and GM employees. Believing that the Section 9267.4 grand jury procedure was illegal because it gave excessive control over the grand jury to the IRS and did not sufficiently insulate grand jury information from civil use, GM filed motions to quash and for a protective order. The government's brief in opposition described the procedures which the government proposed to use in conducting the investigation, and revealed that Mr. Piliaris, the IRS attorney who had prepared the referral recommendation to the Department of Justice, would be present in the grand jury room to question the witnesses called before the grand jury. In fact, the letter from the Justice Department authorizing Mr. Piliaris

to conduct the grand jury proceedings described him as "an attorney for the Government employed full time by Chief Counsel, Internal Revenue Service" [App. G-1]. Since Mr. Piliaris' presence in the grand jury room violated Rule 6(d) and accentuated what GM believed to be improper IRS influence on the grand jury proceeding, GM filed a further motion seeking an order prohibiting Mr. Piliaris from participating.

The District Court held an *in camera* hearing from which GM counsel were excluded, at which the government made an *ex parte* presentation. Formal argument was then held in open court. On June 28, 1977, the court delivered an oral opinion (App. D, *infra*) in which the court ruled that administrative review of grand jury materials by IRS officials for the purpose of deciding whether to recommend prosecution was contrary to Rule 6(e) of the Federal Rules of Criminal Procedure as it then stood, but that participation in the investigation by the Special Agents and participation by Mr. Piliaris in the grand jury sessions were permissible. The court issued three orders which *inter alia* denied GM's motion regarding Mr. Piliaris. GM filed a notice of appeal and sought a stay pending appeal, which was denied by the District Court and by Circuit Judge Engel.

On July 6, 1977, the grand jury began hearing testimony from GM employees and other witnesses, and the grand jury continued calling witnesses and receiving GM documents until April 5, 1978. Mr. Piliaris participated actively in these proceedings.

Meanwhile, on August 23, 1977, the District Court granted GM's request to certify its June 30 order regarding Mr. Piliaris pursuant to 28 U.S.C. § 1292(b) (App. E, *infra*). GM filed a timely petition for permission to appeal in the Sixth Circuit, which the Sixth Circuit granted (App.

F, *infra*) on October 3, 1977.[2] On April 5, 1978, a panel of that court, one judge dissenting, reversed the judgment of the District Court, holding that the participation of Mr. Piliaris in the grand jury proceedings invalidated the grand jury (App. C, *infra*).

The government voluntarily suspended the grand jury proceedings upon receiving the panel decision[3] and filed a timely petition for rehearing *en banc*. The District Court entered an order, as agreed by GM and the government, impounding the grand jury documents and transcripts until completion of all appellate reviews. The petition for rehearing was granted. On September 7, 1978, the Sixth Circuit *en banc* dismissed the appeal, holding that "The District Court's order is not reviewable under the Interlocutory Appeals Act of 1958" and that the order

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2. The government filed a motion to dismiss GM's appeal of right pursuant to § 1291, and opposed GM's petition for permission to appeal pursuant to § 1292(b). The Sixth Circuit decided to accept the appeal under § 1292(b) and dismissed the § 1291 appeal. *See* App. F, *infra*.

3. The grand jury proceedings were never halted, suspended, delayed, or otherwise hindered during the pendency of GM's appeal. No court stayed the grand jury proceedings. Over 100 GM employees testified before the grand jury, and GM produced many thousands of documents to the grand jury in response to over 160 subpoenas duces tecum. Only after the Sixth Circuit panel ruled the grand jury proceedings invalid did the government voluntarily suspend the investigation. In subsequently vacating the panel decision and dismissing GM's appeal, the *en banc* majority apparently overlooked the facts of this case, ruling that an appeal should not be allowed because of a policy against delaying grand jury proceedings.

likewise could not be appealed under 28 U.S.C. § 1291.[4] There were two dissenting opinions and one concurring opinion. The term of the grand jury expired on October 18, 1978.[5]

REASONS FOR GRANTING THE WRIT

GM's appeal to the Sixth Circuit raised an important question concerning the interpretation of the Criminal Rules promulgated by this Court and the fair and proper administration of criminal justice: Can an attorney employed by the IRS with substantial responsibility within his agency for a tax matter be permitted to conduct a grand jury investigation of the taxpayer and its employees? This practice raises such significant problems of fundamental fairness, conflict of interest, abuse of process, and grand jury secrecy that it should be reviewed under the supervisory responsibilities of this Court. Circuit Judge Weick described this issue as creating "one of the most

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4. When the Sixth Circuit panel dismissed GM's § 1291 appeal, GM could not at that time seek certiorari to review the order dismissing its § 1291 appeal on the Piliaris issue, since the simultaneous granting of GM's § 1292(b) appeal rendered that § 1291 question moot. The extraordinary action by the Sixth Circuit of overruling the panel decision of October 3, 1977 to accept the § 1292(b) appeal should not be construed to leave GM unable to obtain review in this Court of the Sixth Circuit's dismissal of GM's § 1291 appeal.

5. The expiration of the grand jury term has not rendered the case moot because the transcripts of testimony taken while Mr. Piliaris was present in the grand jury room have not been destroyed and the government has stated that the investigation is not yet complete. Thus GM has a continuing interest "more substantial than a naked desire for vindication." 13 Wright & Miller, Federal Practice and Procedure § 3533, p. 263; *cf. United States v. Briggs*, 514 F.2d 794, 797 (5th Cir. 1975).

important cases ever to be presented to an appellate court for review." (App. B-14). The District Court certified the issue as "a controlling question of law as to which there is a substantial ground for difference of opinion" while the grand jury continued, and the panel of the Sixth Circuit exercised its supervisory responsibility in deciding the substantive issue.

In vacating the panel decision and dismissing the appeal for lack of jurisdiction, the majority of the Sixth Circuit *en banc* adopted an unduly narrow construction of a remedial jurisdictional statute, adopted a construction of § 1291 which conflicts with many decided cases, and left standing by appellate default a grand jury practice which is likely to become prevalent if it is not promptly invalidated.[6]

I. The Holding Below, That Interlocutory Appeals Pursuant to 28 U.S.C. § 1292(b) Cannot Be Taken from Orders Relating to Grand Jury Investigations, Is Contrary to All Decided Cases in Point and to the Remedial Purpose of the Statute.

The Sixth Circuit *en banc* majority, without even mentioning the prior case law adverse to its position, concluded that GM's appeal pursuant to 28 U.S.C. § 1292(b) must be dismissed for lack of jurisdiction because a proceeding on a motion involving an aspect of a grand jury investigation is not a "civil action" (App. B-4).

[6] Although the Sixth Circuit *en banc* decided only the jurisdictional question, which would make appropriate a remand upon reversal, this Court may choose to act upon this petition by also reaching the question raised in GM's appeal to the Sixth Circuit, in the exercise of this Court's supervisory powers. In fact, two judges concurring in the majority decision filed an opinion expressing their views on the substantive question, and two dissenting judges expressed their views on the substantive question in the prior panel decision and in Judge Weick's dissent.

This unprecedented holding, which was reached despite certification by the District Court, acceptance of the § 1292(b) appeal by a panel of the Sixth Circuit, and decision on the merits by another Sixth Circuit panel, conflicts with the Third Circuit's acceptance of such an appeal in *In re Grand Jury Impaneled Jan. 21, 1975*, 541 F.2d 373 (3d Cir. 1976), as well as with the certification of such an appeal in *In re Grand Jury Investigation*, 338 F. Supp. 1379 (W.D. Pa. 1972). Moreover, the Second Circuit, in *In re Grand Jury Subpoena Served on John Doe*, 546 F.2d 498, 501-02 (2d Cir. 1976), and the First Circuit in *In re Grand Jury Proceedings*, 580 F.2d 13, 17 (1st Cir. 1978), clearly indicated that § 1292(b) appeals are available from orders relating to grand jury investigations. The majority below also ignored two prior Sixth Circuit decisions that are plainly inconsistent with its conclusion.[7] By contrast, no decided case agrees with the decision below.

The Sixth Circuit majority referred to the general policy against interlocutory appeals in criminal cases in support of its restrictive interpretation of § 1292(b). The Sixth Circuit's view that this is a criminal case (and is thus not appealable) cannot be reconciled with this Court's constitutional decisions that a criminal action does not

[7] *United States v. Neiberger*, 460 F.2d 290, 292 (6th Cir. 1972); *United States v. Calandra*, 455 F.2d 750, 752-53 (6th Cir. 1972), *rev'd on other grounds*, 414 U.S. 338 (1974). In these cases the government argued that grand jury proceedings are not criminal cases, and that therefore the limitations on the government's right to appeal in criminal cases contained in 18 U.S.C. § 3731, as then in force, did not apply. The Sixth Circuit allowed the government's appeal in both cases. In *Neiberger* it stated that an order denying the government's application for a grant of immunity to grand jury witnesses was "a final decision in a civil action and, hence, subject to appeal to this court." 460 F.2d at 292.

commence until arrest or the filing of an information or indictment.

The first proceeding in a criminal prosecution is arraignment. *Moore v. Illinois*, 434 U.S. 220, 226-27 (1977); *United States v. Mandujano*, 425 U.S. 564 (1976); *Kirby v. Illinois*, 406 U.S. 682 (1972). The traditional exclusion of counsel from a grand jury room can be reconciled with the Sixth Amendment only on the theory that a grand jury investigation is not a "criminal prosecution." None of the events required to make this case a criminal prosecution has occurred. Indeed, in this investigation no determination has been made by anyone that a criminal prosecution is warranted.

The question whether interlocutory appeals pursuant to 28 U.S.C. § 1292(b) are permitted from orders relating to grand jury investigations is of great importance in the uniform administration of justice in the federal courts. The Internal Revenue Service has recently revised its procedures to expand greatly the occasions on which it will request grand jury investigations in lieu of using its own investigatory powers. See *infra*, note 21. The Department of Justice has reported to Congress on the growing use of grand juries for criminal tax investigations.[8] This trend toward using grand juries for lengthy investigations in conjunction with administrative agencies emphasizes the need for an appellate safety valve to prevent an erroneous early ruling on a difficult question from later invalidating subsequent years of effort by the parties. District Judge Churchill cited this very consideration in certifying his order for interlocutory appeal (App. E-1).

Except for the decision below, the federal courts have consistently construed the term "civil action" to include

8. Testimony of Assistant Attorney General M. Carr Ferguson before Senate Judiciary Committee, reported in *BNA Daily Tax Report* No. 76, April 19, 1978, at G-8 et seq.

everything that is not a criminal prosecution.[9] As a result, § 1292(b) appeals have been allowed, not only in ordinary civil litigation, but also in admiralty[10] and habeas corpus[11] cases – in everything but criminal prosecutions.

The Sixth Circuit was strongly influenced by its concern that grand jury investigations not be interrupted by appellate proceedings. It plainly overlooked the fact that the grand jury investigation in this case was *not* stayed during the pendency of the § 1292(b) appeal. Indeed, stays are *not* automatic by the very terms of the statute, and should be granted in cases arising out of grand jury proceedings only for sufficiently grave cause. Morever, since a § 1292(b) appeal cannot occur without the required certificate from the district judge and grant of permission by the court of appeals, only issues which are truly deserving of interlocutory appellate review can reach the appellate court during the grand jury stage. The three factors – the absence of automatic stay, the requirement of district court certification, and the requirement of court of appeals permission – prevent § 1292(b) appeals from being used to delay the grand jury. Thus the Sixth Circuit's concern is plainly unwarranted.

9. *Continental Grain Co. v. Federal Barge Lines, Inc.*, 268 F.2d 240 (5th Cir. 1959), *aff'd sub nom. Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960); *McLean Trucking Co. v. United States*, 387 F.2d 657 (Ct. Cl. 1957); 9 Moore's Federal Practice, ¶¶ 204.08[1], 204.15.

10. *Continental Grain Co. v. Federal Barge Lines, Inc., supra* note 9; *Medomsley Steam Shipping Co. v. Elizabeth River Terminals, Inc.*, 317 F.2d 741 (4th Cir. 1963).

11. *Wainwright v. Sykes*, 528 F.2d 522 (5th Cir. 1976), *rev'd on other grounds*, 433 U.S. 72 (1977); *Huante v. Craven*, 500 F.2d 1004 (9th Cir. 1974); *Parisi v. Davidson*, 435 F.2d 299 (9th Cir. 1970), *rev'd on other grounds*, 405 U.S. 34 (1972). Like grand jury proceedings, habeas corpus cases relate to criminal matters but are not criminal prosecutions.

The clear purpose of Congress in enacting § 1292(b) in 1958 was to provide an exception to the rigid final judgment rule where interlocutory review would be beneficial. The heretofore uniform interpretation of the federal courts accords with that purpose. The purpose is just as applicable to a grand jury proceeding as to an action for damages.[12] The statute was not confined to narrow categories of cases; indeed, Judge John J. Parker, testifying before the House Judiciary Subcommittee, stated that "it is impossible to foresee the various types of cases that might arise."[13] Accordingly, § 1292(b) should be construed to be available in every kind of case in which its stated conditions are met, except those cases which are criminal in the sense contemplated by the Sixth Amendment and the decisions of this Court.

This Court should grant certiorari to resolve the differences between the decision below and the other cases cited *supra*, p. 9, and to construe authoritatively the remedial scope of § 1292(b).[14]

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12. The D.C. Circuit has stated that an immediate appeal is more appropriate in the grand jury context than in the context of an ongoing lawsuit. *Community Broadcasting of Boston, Inc. v. F.C.C.*, 546 F.2d 1022, 1028 n.41 (D.C. Cir. 1976).

13. *Appeals from Interlocutory Orders: Hearings on H.R. 6238 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 85th Cong., 2d Sess. 19 (Feb. 26, 1958).

14. The Sixth Circuit, after holding that § 1292(b) does not allow interlocutory review of orders relating to grand jury proceedings under any circumstances, stated that "[E]ven if this appeal could be characterized as an appeal in a 'civil action' within the meaning of § 1292(b), we would exercise our statutory discretion by dismissing this appeal . . ." The holding of the Sixth Circuit that there was no jurisdiction makes the reference to discretion essentially *dictum*. Moreover, it is apparent from the majority opinion that the majority failed to take into account that, as illustrated by this case, § 1292(b) appeals can be heard without any delay or disruption of the grand jury proceedings.

II. The Sixth Circuit's Holding That No Appeal Lay Under 28 U.S.C. § 1291 Conflicts With Settled Law That Orders Relating to Disqualification of Counsel in a Grand Jury Proceeding Are Appealable.

The Sixth Circuit, relying on authorities unrelated to disqualification of counsel, ruled that GM could not appeal under 28 U.S.C. § 1291 from the District Court's order refusing to disqualify Mr. Piliaris because of a conflict of interest. This ruling is inconsistent with the settled rule that orders disqualifying counsel in a grand jury proceeding are immediately appealable under 28 U.S.C. § 1291.[15]

These decisions reflect a general rule,[16] prevailing in eight circuits,[17] that all orders relating to attorney disqualification, whether disqualifying the attorney or allowing him to proceed, are always immediately appealable. The Sixth Circuit itself previously allowed an immediate § 1291 appeal from an order refusing to disqualify counsel. *Mela-*

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15. *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977); *In re Investigation Before the February 1977 Lynchburg Grand Jury*, 563 F.2d 652 (4th Cir. 1977), and cases cited therein at 655.

16. *MacKeithan v. Peat, Marwick, Mitchell & Co.* 557 F.2d 395 (4th Cir. 1977); *Kerr-McGee Co. v. Westinghouse Electric Co.*, 580 F.2d 1311 (7th Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3168 (U.S. Sept. 13, 1978) (No. 78-422); See cases cited in *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 607 (8th Cir. 1977), *cert. denied*, 98 S.Ct. 2235 (1978).

17. The Ninth Circuit apparently does not allow immediate § 1291 appeals, but achieves the same result by reviewing such orders under the All Writs Act, 28 U.S.C. § 1651. *Cord v. Smith*, 338 F.2d 516 (9th Cir. 1964), *modified*, 370 F.2d 418 (9th Cir. 1966). The District of Columbia Circuit permits appeals from orders disqualifying counsel, but not from orders refusing to disqualify them. *Compare In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976), *with Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022 (D.C. Cir. 1976).

med v. ITT Continental Baking Co., 534 F.2d 82 (6th Cir. 1976).

The reasons for the prevailing rule permitting an immediate appeal from an order denying disqualification of counsel are that "the order is collateral to the main proceeding yet has grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief." *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800, 805 (2d Cir. 1974).

These reasons are equally applicable to grand jury proceedings. If, as here, the grand jury proceeds with the challenged lawyer actively participating, and an appellate court ultimately decides after trial and conviction that he should have been disqualified, then nullification of years of litigation is extraordinarily inefficient and burdensome, for both the parties and the courts. But if, to avoid that result, the appellate court which eventually determines that the refusal to disqualify was erroneous nevertheless affirms for lack of substantial prejudice, the challenging party has been unfairly treated. This dilemma for the reviewing court years after the motion to disqualify was denied is completely avoided by allowing an immediate appeal under 28 U.S.C. § 1291 to resolve the disqualification issue promptly. Such an appeal is clearly necessary in grand jury cases as well as others.

The fact that here the motion to disqualify was directed at a government lawyer rather than an attorney for a private party should not change the result: the question of appealability clearly should not depend on which lawyer is involved. The government has appealed denial of its disqualification motions; [18] that same right should not be denied to GM or any other private party.

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[18] *E.g., United States v. Trafficante*, 328 F.2d 117 (5th Cir. 1964).

III. The Sixth Circuit's Refusal to Consider Mandamus Was Erroneous.

The Sixth Circuit majority refused to consider mandamus as an alternative method of review solely because District Judge Churchill had not been made a party to the case (App. B-3 fn. 2). However, four of the seven judges comprising the *en banc* panel believed that the disqualification issue was appropriate for consideration through supervisory mandamus. Two concurring judges stated that "this court could properly consider the case under the all writs statute, 28 U.S.C. § 1651 (1970), as a petition for a writ of mandamus" (App. B-9). Judge Weick, dissenting, stated that "an appellate court has the power to review by mandamus an issue of first impression involving an undecided problem" (App. B-30). Dissenting Judge Celebrezze had earlier joined in the panel opinion holding mandamus available (App. C-7).

The Sixth Circuit's refusal to consider mandamus on technical grounds was plainly unjustified under the circumstances of this case. GM had no reason to apply formally for a writ of mandamus in the Sixth Circuit because that court had accepted its appeal under § 1292(b) and had decided the case on the merits. Moreover, because District Judge Churchill's certification under § 1292(b) demonstrated his belief that the disqualification issue required immediate review, his participation in the Sixth Circuit proceedings would have been a mere formality.

This case warrants review under the concept of supervisory mandamus, developed by this Court in *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). The disqualification issue is vital to the proper administration of justice in the federal courts, and it involves an important question of first impression. Supervisory mandamus has been regularly invoked by the federal appellate courts in cases involving

criminal trial and grand jury proceedings.[19] Following its dismissal of the § 1291 and § 1292(b) appeals, the Sixth Circuit's refusal to consider supervisory mandamus, solely because of a technical defect, was error.

IV. This Court Should Exercise Its Supervisory Powers to Prevent Encroachment by Administrative Agencies into the Powers and Province of Federal Grand Juries.

The use of an attorney employed by the IRS to conduct a grand jury proceeding which he requested on behalf of the IRS raises important questions concerning the administration of federal criminal justice and the abuse of the grand jury process. Circuit Judge Weick points out in his dissent (App. B-15):

> In the present case the grand jury is not only *being used to assist in the administrative inquiry*, but also the Special Attorney conducting the grand jury investigation is the attorney for, and is on the payroll of, the aggrieved agency, and the one who recommended the grand jury investigation.

This practice should be condemned before it further expands. First, it is contrary to statute. Second, it seriously erodes the few protective features contained in the grand jury system, including the independence and presumed neutrality of the grand jury panel and the secrecy of grand jury proceedings. Third, it creates a conflict of interest and an appearance of impropriety.

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19. *United States v. United States District Court.*, 238 F.2d 713 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957); *United States v. United States District Court*, 444 F.2d 651 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972); *United States v. Dooling*, 406 F.2d 192 (2d Cir.), *cert. denied*, 395 U.S. 911 (1969); *United States v. Lasker*, 481 F.2d 229 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974); *see In re Grand Jury Proceedings*, 580 F.2d 13, 17-18 (1st Cir. 1978).

Only Justice Department attorneys may conduct grand jury investigations and criminal litigation. Congress has provided that "except as otherwise provided by law" an Executive department may not employ an attorney "for the conduct of litigation in which the United States, an agency, or employee thereof is a party . . . or for the securing of evidence therefor, but shall refer the matter to the Department of Justice." 5 U.S.C. § 3106. This statute is the present codification of Executive Order No. 6166 (1933), 5 U.S.C.A. § 901 note, which consolidated litigation authority, previously exercised by such agency attorneys as the General Counsel of the Bureau of Internal Revenue, under the direct supervision of the Attorney General.

Federal Rule of Criminal Procedure 6(d) permits only Justice Department attorneys to be present in the grand jury room, and Rule 6(e) permits only Justice Department attorneys to have access to grand jury materials and to decide who else may scrutinize grand jury materials. See Rule 54(c), definition of "Attorney for the Government." Every court which has confronted the question whether an attorney employed by an administrative agency is an "attorney for the government" within Rule 6 has concluded that such attorneys are not included. *In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962); *In re Grand Jury Investigation*, 414 F. Supp. 74 (S.D.N.Y. 1976); *United States v. Daneals*, 370 F. Supp. 1289 (W.D.N.Y. 1974); *United States v. General Electric Company*, 209 F. Supp. 197 (E.D. Pa. 1962); see also, *Capitol Indemnity Corp. v. First Minnesota Construction Co.*, 405 F. Supp. 929, 933-34 (D. Mass. 1975).

In order to avoid the force of the statutes, rules and court decisions described above, Mr. Piliaris obtained from the Justice Department a letter (App. G-1) designating him a "Special Assistant United States Attorney" while "employed full time by Chief Counsel, Internal Revenue Service." The government contends that 28 U.S.C. §§ 515

and 543 give the Attorney General absolute discretion to place any attorney he chooses in a grand jury room as a prosecutor. GM contends that such a letter does not transform an administrative agency employee with prior responsibility for the same matter in the agency into a prosecutor legally competent to conduct grand jury proceedings.

The IRS has broad investigatory powers. Prior to making an institutional decision to recommend criminal prosecution,[20] the IRS may use its summons power to investigate possible civil and criminal tax offenses, 26 U.S.C. § 7602; *United States v. LaSalle National Bank*, 98 S.Ct. 2357 (1978), but a taxpayer or employee receiving a summons must be given ten days to respond, 26 U.S.C. § 7605(a), and has a right to be represented by counsel, 5 U.S.C. § 555(a) and to receive or inspect a transcript of his testimony, 5 U.S.C. § 555(b).

In contrast, a witness may be summoned by a grand jury immediately, must enter the grand jury room without counsel, and has no right to receive, review, or correct the transcript of his testimony. He has no right to object to the questions put to him except upon a claim of privilege. A grand jury conducted by an IRS prosecutor gives the IRS both the advantage of conducting its own investigation and the advantage of using the extraordinary *in camera* proceedings of the grand jury. In oral argument District Judge Churchill asked one of the government attorneys:

> What's stopping the United States Government from using the grand jury as an investigative tool in almost every big tax case?

[20] No recommendation for prosecution has been made by the IRS in this matter.

> MR. FORREST . . . It may well do that because it's a . . .
>
> THE COURT: Such a useful tool?

The IRS has recently published elaborate "precautions" designed to allow its agents to review grand jury evidence without corrupting the grand jury process or violating grand jury secrecy and independence.[21] The cornerstone of these protections is the requirement that such IRS Agents work only at the request and under the supervision of the "attorney for the government."

Of what value are the statutes, Rules of Criminal Procedure, court decisions and IRS rules that IRS personnel can assist the grand jury only at the request and under the supervision of the attorney for the government if the attorney for the government is an IRS lawyer?

Federal law prohibits the use of grand jury powers by administrative agencies. See *In re Stolar*, 397 F. Supp. 520, 523 (S.D.N.Y. 1975). This Court has declared that a grand jury may only be used to investigate the possible commission of crimes, and cannot serve a civil purpose. *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). The facts in this case demonstrate that, contrary to this settled principle, the IRS saw this grand jury as a tool to obtain information for its own use. Mr. Piliaris, in drafting the letter to the Justice Department seeking the convening of a grand jury, stated:

> At the appropriate time we will request that an order be sought from the Court authorizing the disclosure of grand jury information to IRS under the provisions of Rule 6(e). [App. D-7]

[21] *See* Grand Jury Matters, Order 3060.1, Office of the Chief Counsel, Internal Revenue Service, June 23, 1978, p. 1; Manual Supplement 9G-85, Internal Revenue Manual, Internal Revenue Service, June 30, 1978. The new rules are extensive, covering 28 pages in the Chief Counsel order and 13 pages in the Internal Revenue Manual.

With numerous IRS agents drafting grand jury subpoenas and studying documents subpoenaed by the grand jury, and with an IRS attorney participating in the decisions on the scope, duration and conduct of the investigation, there is grave danger that this grand jury has or will become an information-gathering tool of the administrative agency.

Because of the secrecy of grand jury proceedings, there is no practical way for a party to ascertain or prove in court in a particular case whether the grand jury is in fact being abused. There is no way to know whether Mr. Piliaris is assisting the Department of Justice lawyers assigned to the case, or is in fact controlling the case. If the procedure claimed by the government in this case to be valid is not disapproved, the IRS or any other administrative agency can have grand juries assigned to its own attorneys for its own purposes, virtually unpoliced.

In addition to breaching grand jury secrecy, this procedure threatens the fundamental fairness of a grand jury proceeding. It is inconsistent with the responsibility of the grand jury to protect the innocent to allow the grand jury investigation to be conducted by the agency attorney who reviewed GM's charges of improper conduct by the employees of the agency and then drafted the referral to the Department of Justice for the grand jury investigation. The courts have consistently held that grand juries may not be conducted by attorneys who have relationships to the matter under investigation which would impair the impartiality of their judgment. *E.g., United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977); *People v. Superior Court of Contra Costa County*, 137 Cal. Rptr. 476 (Cal. 1977). An attorney may not prosecute a case at the same time as he represents the victim in a civil case arising out of the same facts. *E.g., Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967).

The Code of Professional Responsibility and the American Bar Association Standards Relating to the Prosecution Function establish that an attorney serving in a grand jury room must avoid the "appearance of professional impropriety" and exercise "sound discretion as an administrator of justice." See ABA Canon 9 and Standards 1.1, 1.2, 3.5, 3.6 and 3.9. Congress has recently reflected its concern for conflicts of interest in the Justice Department. *See* Ethics in Government Act of 1978, § 603 (signed by the President October 26, 1978), adding § 528 to Title 28 as shown *infra* at A-4. The prosecuting attorney is more than a mere advocate; he is a quasi-judicial officer. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *United States v. Calandra*, 414 U.S. 338 (1974).

In practice, whether a grand jury returns an indictment depends largely on whether the government prosecutor requests one. The prosecutor has virtually unreviewable discretion as to the evidence he presents and as to his comments on the evidence and the law. Thus, the oft-repeated statement that a prosecutor in a grand jury proceeding must be impartial is not a mere aspirational ideal but is of vital practical importance in view of Judge Churchill's recognition of the prosecutor's grand jury responsibility. The "main line of defense against abuse of the grand jury process," Judge Churchill declared, is "the good conscience and self restraint of the government prosecutors. . . . The more willingly the decision-making process is surrendered or shared with others the less protective will be their self restraint." (App. D-3).

For this reason, Circuit Judge Weick strongly objected to the practical effect of the *en banc* majority decision:

> Our citizens who are being investigated by a grand jury surely have the right to object to an attorney on the payroll of the victim of the alleged fraud conducting the grand jury proceedings, and this in-

> justice should be stopped by the courts as soon as the issue is presented, not delayed while the citizens are continuously subjected to this improper treatment. [App. B-34 n.7]

Judge Weick's concern that an IRS attorney will not discharge his duty of impartiality is well justified. The Internal Revenue Service Enforcement Division Manual § 103 (1969) provides:

> Enforcement attorneys must never lose sight of the significance of criminal prosecutions to revenue enforcement. They must be keenly alert to any relaxation in *the driving force* which must impel these cases toward successful conclusion. [Emphasis added].

In view of such instructions, as well as the inherent tendency of an agency employee to vindicate agency interests, this Court should follow the suggestion of the commentator who urged:

> The final word as to whether or not to ask for an indictment should not rest with the tax assessing and collecting agency. Here is one of the supreme tests of the competency and fairness of the republican form of Government. It should be *entirely separated* from the strictly financial interest of the Government and should reside solely in the Government's chief law office.

Buck, *Federal Tax Litigation and the Tax Division of the Department of Justice*, 27 Va. L. Rev. 873, 895 (1941) [emphasis added].

CONCLUSION

Circuit Judge Weick in his dissent appropriately called attention to the current public interest in grand jury reform when he said (App. B-15):

> The activities of Congress, of the ABA, and of other organizations, for grand jury reform, might not have been necessary if the judiciary had performed its rightful function. We should not abdicate our own responsibilities to correct grand jury abuse.

In this case the lower courts have failed to exercise these responsibilities and have established dangerous precedent for the future. Accordingly, this Court should issue a writ of certiorari to review the judgment and opinion of the Sixth Circuit in this case.

November 3, 1978

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Appendix A

STATUTES INVOLVED

28 U.S.C. § 1292(b):

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.
>
> [72 Stat. 1770]

28 U.S.C. § 1291:

> Final decisions of district courts
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.
>
> [72 Stat. 348]

28 U.S.C. § 1651:

> Writs
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

[63 Stat. 102]

Federal Rule of Criminal Procedure 6(d):

Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Federal Rule of Criminal Procedure 54(c):

Application of Terms. As used in these rules the following terms have the designated meanings.

. . . .

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein.

5 U.S.C. § 3106:

Employment of attorneys; restrictions

Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice. This section does not apply to the employment and payment of counsel under section 1037 of title 10.

[80 Stat. 415]

28 U.S.C. § 515:

Authority for legal proceedings; commission, oath, and salary for special attorneys.

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000.

[80 Stat. 613]

28 U.S.C. § 543:

Special attorneys

(a) The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.

(b) Each attorney appointed under this section is subject to removal by the Attorney General.

[80 Stat. 618]

U.S.C. § 528:

Disqualification of officers and employees of the Department of Justice

The Attorney General shall promulgate rules and regulations which require the disqualification of any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof. Such rules and regulations may provide that a willful violation of any provision thereof shall result in removal from office.

[92 Stat. 1824]

Appendix B

No. 77-1599

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE APRIL 1977 GRAND JURY SUBPOENAS

GENERAL MOTORS CORPORATION, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

REHEARING *en banc*

Decided and Filed September 7, 1978.

Before: PHILLIPS, Chief Judge; WEICK, EDWARDS, CELEBREZZE, LIVELY, ENGEL and MERRITT, Circuit Judges; PECK, Senior Circuit Judge.*

MERRITT, Circuit Judge, delivered the opinion of the Court, in which PHILLIPS, Chief Judge and EDWARDS, LIVELY and ENGEL, Circuit Judges, joined. EDWARDS, Circuit Judge, (pp. 9-12) filed a separate concurring opinion in which LIVELY, Circuit Judge, joined. CELEBREZZE, Circuit Judge, (p. 13) filed a separate dissenting opinion and WEICK, Circuit Judge, (pp. 14-34) also filed a separate dissenting opinion.

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* The Honorable John W. Peck heard oral argument and participated in conference consideration of the case, but he became Senior Judge on July 1, 1978, and withdrew from further consideration of the case at that time. *See* 28 U.S.C. § 46 (1970) and Rule 35, Federal Rules of Appellate Procedure.

The Honorable Damon J. Keith recused himself and did not participate in consideration of the case.

MERRITT, Circuit Judge. General Motors appeals under the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b) (1970), from an interolcutory order of the District Court refusing to disqualify a government lawyer from participation in grand jury proceedings. We hold that the original certification of this appeal under § 1292(b) by a panel of this Court was improvidently granted, and we therefore dismiss the appeal.

I. STATEMENT OF THE CASE

In February, 1977, the Department of Justice approved the convening of a special federal grand jury in Detroit to investigate possible criminal tax violations by General Motors. On April 15, 1977, the Attorney General appointed an Internal Revenue Service lawyer to assist Justice Department lawyers in conducting the grand jury inquiry. General Motors moved to disqualify the IRS lawyer from participation in the grand jury proceedings on the grounds that public policy considerations and conflict-of-interest principles of the legal profession prohibit such participation by IRS lawyers who have previously participated in a civil tax investigation of the taxpayer.

Finding that the Attorney General's action is specifically authorized by statute, 28 U.S.C. §§ 515, 543 (1970), the District Judge overruled General Motors' motion to disqualify but certified the issue to us under the Interlocutory Appeals Act of 1958, as a "controlling question" – apparently on the ground that, if the District Court's ruling were later found to be erroneous, the presence of an IRS lawyer in the grand jury room might void any indictment returned by the grand jury against General Motors or its officials. General Motors pursued its appeal to this Court under the Interlocutory Appeals Act, and it also appealed under 28 U.S.C. § 1291 (1970), treating the order as a "final decision" for the purposes of review.

The government then moved to dismiss both appeals, the § 1291 appeal on the grounds that the lower court order over-

ruling General Motors' motion to disqualify was interlocutory and not final, and the § 1292(b) interlocutory appeal on the grounds that such piecemeal appeals are not allowed in criminal cases. Without oral argument or conference consideration, an administrative panel of this Court, consisting of Judges Weick, Edwards and Celebrezze, entered an order on October 3, 1977, dismissing General Motors' § 1291 appeal (No. 77-1508) but granting General Motors leave to proceed under § 1292(b). A different panel of this Court, consisting of Judges Weick, Celebrezze and Merritt, then heard the § 1292 (b) appeal on the merits and filed an opinion dated April 5, 1978, reported at –– F.2d ––, holding that this court has appellate jurisdiction and that the IRS lawyer should be barred from the grand jury proceedings. Judge Merritt dissented. On motion by the government, we vacated the panel opinion and ordered rehearing *en banc* under Rule 35 of the Federal Rules of Appellate Procedure and the Rules of this Court.[1]

II. THE ISSUE OF APPELLATE JURISDICTION

The District Court's order is not reviewable under the Interlocutory Appeals Act of 1958.[2] The Act authorizes an appeal from an interim or non-final decision "in a civil action" upon a certification by the District Judge that his decision raises a

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[1] "The effect of the granting of a hearing *en banc* shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket as a pending appeal." Rule 14(a), *Rules of the United States Court of Appeals for the Sixth Circuit.*

[2] General Motors argues in the alternative that we should assert appellate jurisdiction by treating this appeal as a petition for writ of mandamus under 28 U.S.C. § 1361 or § 1651 (1970). The Court does not reach or decide this question because General Motors has not applied for a writ of mandamus in this proceeding, and the District Judge has not received notice or had an opportunity to be heard and thus has not been made a litigant on this appeal. For discussion of appellate procedure in mandamus actions, see generally Rule 21, *Federal Rules of Appellate Procedure*; *Will* v. *Calvert Fire Ins. Co.*, 98 S.Ct. 2552 (1978); *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964); Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973).

"controlling question of law as to which there is substantial ground for difference of opinion," and that resolution of the issue "may materially advance the ultimate termination of the litigation." The statute in question establishes the right of interlocutory appeal in *civil* cases, but it extinguishes that right in *criminal* cases and in other matters which may not be properly characterized as "civil actions." From a simple reading of the statute itself, it seems self-evident that a grand jury investigation of possible criminal tax violations should not be characterized as a "civil action" under § 1292(b) and that we lack jurisdiction under the Interlocutory Appeals Act.

This conclusion is based not simply on a mechanical application of the terms "civil" or "criminal" to the proceedings below but rests also on an established line of precedent disapproving appellate interruption of the grand jury's investigation. In *Cobbledick* v. *United States*, 309 U.S. 323 (1940), the Supreme Court held that a district court's refusal to quash a grand jury subpoena was not appealable as a final order under § 1291. In an opinion suggesting that a grand jury proceeding is part of the criminal process, Justice Frankfurter, writing for the Court, recognized the historic principle of judicial administration "forbidding piecemeal disposition" and "separate review of the component elements" of criminal cases. 309 U.S. at 325. The principle is designed to conserve judicial time and prevent delaying tactics in criminal proceedings. Justice Frankfurther pointed out that the fifth amendment makes the grand jury a necessary part of the criminal process and explained that "[i]t is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found." *Id.* at 327.

In *United States* v. *Ryan*, 402 U.S. 530 (1971), the Supreme Court recently reaffirmed the holding of *Cobbledick* and the principles on which it is based, observing that a contempt citation for disobeying the subpoena is the only way to obtain

review of such a grand jury question in advance of indictment and trial:

> [W]e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal. 402 U.S. at 532-33.

General Motors has available the same appellate remedies recognized in *Ryan*. It can raise the disqualification of counsel issue after indictment and conviction, the normal course of review in such cases, or it can refuse to obey grand jury subpoenas on this ground and appeal a contempt citation. These are the usual remedies, and they are adequate.

Justice Frankfurter in *Cobbledick* and Justice Brennan in *Ryan* applied these principles of appellate review in order to prevent interlocutory appeals from grand jury activity under § 1291. The Interlocutory Appeals Act, passed eighteen years after the *Cobbledick* decision, is based on these same principles forbidding piecemeal review of such cases. The Act limits interim review of "a controlling question of law" to *civil* cases only and, therefore, should not be read to allow interlocutory review of grand jury proceedings.

Even if this appeal could be characterized as an appeal in a "civil action" within the meaning of § 1292(b), we would exercise our statutory discretion by dismissing this appeal since we do not believe that resolution of this issue at this time would "materially advance the ultimate termination of the litigation." The legislative history of the Interlocutory Appeals Act suggests that interlocutory appeals, even in civil cases, should be "sparingly granted."[3] To allow an appeal

[3] *See* Judge Maris' discussion of the legislative history in *Milbert* v. *Bison Laboratories*, 260 F.2d 431, 433 (3rd Cir. 1958) (*en banc*).

when the District Court has refused to disqualify a government lawyer from a grand jury investigation simply disrupts the investigation and creates the possibility that the target of the inquiry – by the threat of delay and protracted legal maneuvering – will exert unwarranted influence in the government's choice of its prosecuting attorney.

General Motors also argues in the alternative that the District Court's order allowing the former IRS lawyer to participate in grand jury proceedings is a "final decision" within the meaning of 28 U.S.C. § 1291 and therefore is appealable as a matter of right. As previously noted, an administrative panel of this Court, consisting of Judges Weick, Edwards and Celebrezze, dismissed General Motors' § 1291 appeal in the same order that certified the § 1292(b) appeal. General Motors did not appeal that dismissal but, as a matter of fairness, we reach the question of appealability under § 1291, since we have not accepted General Motors' appeal under § 1292(b).

In the *Cobbledick* and *Ryan* cases, discussed above, both of which were brought under § 1291, the Supreme Court held that District Court orders controlling the issuance of grand jury subpoenas are not final decisions for the purposes of appeal. For the reasons we have already set forth, we believe that the holding and the principles applied in these two cases preclude General Motors' appeal under § 1291 here. We note also that the Supreme Court recently reaffirmed these principles in *Coopers & Lybrand* v. *Livesay*, 98 S.Ct. 2454 (1978), holding that a district court's determination that a lawsuit may not be maintained as a class action is not appealable as a final decision under § 1291. The Court based its decision in part on the factors of "potential waste" and delay discussed in the

See also Kraus v. *Bd. of County Comm'rs*, 364 F.2d 919, 922 (6th Cir. 1966) (invoking "exceptional case" standard as criterion to be met under § 1292(b)); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 626-27 (1975) ("[B]ecause the Act is premised on a notion that there should be case-by-case evaluation of efficiency, any universal standard restricting certification seems out of place.")

Cobbledick decision, and quoted approvingly the following excerpt from Justice Frankfurter's opinion in *Cobbledick*:

> Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harrassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate review of the component elements in a unified cause. 309 U.S. at 325.

The Supreme Court repeated the principle disfavoring interlocutory appeals in criminal cases under § 1291 in another decision last term, *United States* v. *MacDonald*, 98 S.Ct. 1547 (1978). In a unanimous opinion, the Court held that a criminal defendant may not appeal, before trial, an order denying his motion to dismiss on speedy trial grounds. Again quoting language from the *Cobbledick* opinion, the Court observed that "the rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law.'" *Id.* at 1549, *quoting* 309 U.S. at 325. The Court noted that it had deviated from this settled principle in a limited category of criminal cases, such as bail review and double jeopardy cases, which "involve an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." 98 S.Ct. at 1552.

As previously discussed, General Motors can raise the disqualification of counsel issue after indictment and conviction or on appeal from a contempt citation. It is not an issue which is "destroyed" if not "vindicated before trial." In addition, if

no indictment is returned but General Motors believes that the government has improperly used the grand jury to obtain evidence for civil law enforcement purposes, it can raise that question by various motions in the civil action, including a motion to suppress the evidence or a motion to dismiss the complaint. These remedies are adequate, and, unlike this appeal, they do not "arrest the momentum of judicial administration" or "encourage delay."

Accordingly, the appeal is dismissed as improvidently granted under 28 U.S.C. § 1292(b).

EDWARDS, Circuit Judge, with whom LIVELY, Circuit Judge, joins, concurring. I join Judge Merritt's opinion dismissing this appeal.

This court has reviewed the record of the grand jury proceedings which was fully developed in the District Court. I conclude after that review that we should now dismiss the appeal for which a panel (of which I was a member) granted leave under 28 U.S.C. § 1292(b) (1970). This decision represents a judgment that, on the facts developed, we lack appellate jurisdiction of the case and, hence, as my colleagues in the majority conclude, response to the argument on the merits advanced in the dissent would not be called for.

I feel, however, that if in fact a prosecutorial conflict of interest constituting abuse of the grand jury process were shown in the record below, this court could properly consider the case under the all writs statute, 28 U.S.C. § 1651 (1970), as a petition for writ of mandamus. *See Schlagenhauf* v. *Holder*, 379 U.S. 104, 109-12 (1964); *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259-60 (1957); *United States* v. *United States District Court*, 407 U.S. 297, 301 n. 3 (1972; Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. Chi. L. Rev. 450, 476-80 (1978). *See also Will* v. *Calvert Fire Ins. Co.*, 46 U.S.L.W. 4811 (U.S. June 23, 1978). Thus, I not only join the opinion of the court in dismissing the appeal, but also consider and reject mandamus as inappropriate on the facts shown in this record.

There is no inherent conflict of interest in the appointment of a federal attorney assigned to the Internal Revenue Service to assist in or conduct a criminal tax investigation through grand jury proceedings. Further, the record made in the District Court shows no abuse of the grand jury process.

The interest of the United States in collection of income taxes is represented both by statutorily authorized civil tax collection proceedings, *see* 26 U.S.C. §§ 7401-7408 (1976) and

(in appropriate cases) criminal fraud prosecutions, *see id.* §§ 7201-7216. These functions are not in conflict and, on the contrary, the latter supplements the former. In a very recent case this principle has been recognized by the Supreme Court. *United States* v. *LaSalle National Bank*, 46 U.S.L.W. 4713, 4716-17 & n. 12 (U.S. June 19, 1978). On this point the *LaSalle* Court appears to be unanimous. *See id.* at 4719 & n. 2 (Stewart, J., dissenting).

Congress has specifically authorized the appointment by the Attorney General of special assistants to "conduct any kind of legal proceeding, . . . including grand jury proceedings. . . ." 28 U.S.C. § 515 (1970). This statute requires that each such special assistant "shall take the oath required by law" of assistants to the Attorney General. This was done.

As found by the panel majority in this case (prior to this *en banc* hearing):

> Nothing precluding such an appointment is found in the Federal Rules of Criminal Procedure. Rule 6(d) of Fed.R.Crim.P. provides that "attorneys for the government" may be present during grand jury sessions. Rule 54(c) defines attorneys for the government as including "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney . . . ."
> *In re April 1977 Grand Jury Subpoenas*, 573 F.2d 936, 941 (6th Cir. 1978) (panel opinion).

Thus this record shows that Special Assistant United States Attorney General Piliaris has been properly designated to perform his grand jury assignment. There are no findings before this court to indicate that he has done anything except demonstrate a zealous interest in collecting federal taxes for a single client – the United States. This clearly has not increased his popularity with the taxpayer, but it does not reflect any lack of legal ethics.

The possible abuse of petitioner General Motors' interests which might arguably develop from the instant investigation can result only if there proves to be no probable cause for grand jury criminal indictment and there is proof that the government in bad faith undertook to employ a grand jury purely for purposes of civil tax investigation. *See United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683-84 (1958). Here the District Judge found that there had been no such proof.[1] There is nothing to indicate that his finding is clearly erroneous.

Further, the District Judge granted General Motors' motion for a protective order specifically guarding against such abuse.[2]

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[1] The District Judge found:

> Whatever the motivation there is no evidence that the Justice Department in this case plans or intends to use the grand jury subpoenas to gather evidence not relating to its criminal investigation.

[2] The District Judge's oral opinion said:

> Specifically the Court determines that attorneys for the government may not disclose matters occurring before the grand jury to agency personnel except for technical assistance and then only as specifically authorized by the Court.

The District Judge's protective order provided:

> This protective order applies with respect to the grand jury investigation of General Motors Corporation and others referred to in the pleadings and briefs in the above-entitled matter.
>
> Except as authorized by this order or as authorized by other written orders of the Court, Attorneys for the Government shall not disclose matters occurring before the grand jury to persons other than jurors, interpreters, stenographers, operators of recording devices, typists, and other attorneys for the government.
>
> The Court is concerned with substance, not form. Applications for specific authorization, the procedure with respect thereto and the Court's action thereon, shall be in a manner substantially consistent with the Court's oral opinion of June 28, 1977.
>
> Attorneys for the Government shall not disclose matters occurring before the grand jury, or summaries thereof, to Internal Revenue Service personnel for the purpose of seeking advice or recommendations with respect to seeking indictments; and if Attorneys for the Government shall apply to the Court for an order authorizing disclosure to persons who are or have been employed by Internal Revenue Service, it shall be

(Continued)

General Motors has a complete remedy in objecting to any evidence being submitted in any subsequent civil tax case which was derived from bad faith employment of the grand jury and in appeal from any judgment rendered against it. The District Court and this court would be particularly alert to such a showing.

In short, we should deny mandamus because this record demonstrates no "exceptional condition," no "clear abuse of judicial discretion" or failure to exercise jurisdiction on the part of the District Judge and no denial of appellate review. *Schlagenhauf* v. *Holder, supra; LaBuy* v. *Howes Leather Co., supra; United States* v. *United States District Court, supra.*

We note that the Fourth Circuit has just decided a case which is in very close agreement with this opinion. *In re Grand Jury Subpoenas, April, 1978,* — F.2d — (4th Cir., Aug. 3, 1978).

The overriding consideration in the present proceeding is, as the majority opinion holds, that grand jury proceedings (the primary criminal investigative tool available to the United States) not be subject to piecemeal appeals and inordinate delays. *Cobbledick* v. *United States,* 309 U.S. 323 (1940).

It would be particularly inappropriate if in this and other cases, the target of a grand jury investigation could delay pursuit of crime while it disputed the Attorney General's choice of the lawyer he deemed best fitted to carry on the government's investigation.

Judge Lively has authorized me to say that he joins this concurring opinion.

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an implied representation that Attorneys for the Government will not seek or receive advice or recommendations from such persons with respect to what indictments, if any, to seek, and Attorneys for the Government shall not seek or receive advice or recommendations with respect thereto from such persons.

Attorneys for the Government are hereby authorized to make limited disclosure, as necessary, to persons for scientific analysis, advice, or opinion provided that such persons are not and have not been employed by Internal Revenue Service.

CELEBREZZE, Circuit Judge, dissenting. I believe that this Court has jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1292(b) and that it should exercise its discretion and do so. The Third Circuit has apparently approved this result, *In re Grand Jury Impanled Jan. 21, 1975,* 541 F.2d 373 (3d Cir. 1976); *see also In re Grand Jury Investigation,* 338 F. Supp. 1379 (W.D. Pa. 1972), and the majority cites no cases on point holding to the contrary.

The majority's assertion that this case does not involve a "civil action" squarely contradicts language in both *United States* v. *Neiberger,* 460 F.2d 290, 292 (6th Cir. 1972), and *United States* v. *Calandra,* 455 F.2d 750, 752-53 (6th Cir. 1972). The majority, curiously, does not mention *Neiberger* or *Calandra,* apparently seeking to overrule them *sub silentio.*[1]

The majority's concern with piecemeal appeals in the grand jury context is well founded, but it overreacts to this concern. There are two safeguards built into § 1292(b) which would sift out almost all interlocutory appeals like this one stemming from grand jury proceedings. First, there is the required certification by the district court and, second, there is the discretion given to the court of appeals to decide whether to hear such appeals. These safeguards would protect against interlocutory appeals in the grand jury context, save for the extraordinary case. I believe that this is an extraordinary case and that the prior panel did not act improvidently in exercising its discretion to hear the appeal.

I respectfully dissent.

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[1] The majority's mechanical interpretation of the phrase "civil action" goes too far. In another context, the Supreme Court has refused to find a "civil" or "criminal" label dispositive but has instead focused upon underlying policy considerations in deciding the propriety of federal abstention from interference with state court proceedings. *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975).

WEICK, Circuit Judge, Dissenting. This is one of the most important cases ever to be presented to an appellate court for review. It involves grand jury abuse where the constitutional right to due process of law of citizens being investigated, is alleged to have been flagrantly violated by an unlawful practice. The unlawful practice is that of appointing as Special Attorney to conduct the grand jury investigation, one who is an attorney for, and is on the payroll of, an aggrieved Government agency, and which agency in reality is the victim of an alleged fraud. Persons being investigated by a grand jury are presumed to be innocent, and a properly appointed Special Attorney owes a duty to protect them from unfounded prosecution.

A panel of this Court, in an opinion reported in 573 F.2d 936 (6th Cir. 1978), held that the attorney for the aggrieved agency (who was on the agency's payroll) had a conflict of interest, or an appearance of a conflict of interest, and was disqualified from acting as a Special Attorney to conduct a grand jury investigation of activities in which the agency or its employees were involved. The panel reversed the judgment of the District Court which had denied General Motor's motion to disqualify the attorney.

I

A grand jury is an arm of the court and is subject to its supervision and control. Ample power to investigate, to correct, and to put a stop to, grand jury abuse is vested in Judicial Councils, 28 U.S.C. § 332(d), and the Judicial Conference of the United States, 28 U.S.C. § 331. Appellate Courts have power to rule on these abuses on direct appeal, 28 U.S.C. § 1291, on interlocutory appeal, 28 U.S.C. § 1292(b), and under the All Writs Act, 28 U.S.C. § 1651.

Despite all this authority the en banc majority has declined to exercise its rightful jurisdiction, and by its reasoning, which is believed to be specious, has dismissed GM's appeal

for lack of jurisdiction. As Judge Celebrezze points out in his dissent, the majority cites no cases on point in support of its position.

It cannot be seriously controverted that many abuses now exist in grand jury functions, which cry out for reform. They are detailed in an article appearing in the American Bar Association Journal, March, 1978, Vol. 64, page 337, a copy of which is appended hereto. The Association has endorsed a comprehensive set of proposals for grand jury reform. Curiously enough, one of the proposed reforms states: "A prosecutor would not be allowed to use the grand jury to assist in an administrative inquiry . . . ." *Id.* at 338.

In the present case the grand jury is not only *being used to assist in the administrative inquiry,* but also the Special Attorney conducting the grand jury investigation is the attorney for, and is on the payroll of, the aggrieved agency, and the one who recommended the grand jury investigation.[1]

The IRS already had ample statutory authority to conduct its own investigation, and it did not need the grand jury. 26 U.S.C. § 7601 *et seq.*

It also appears from the ABA article that Congress has been looking into grand jury abuse since 1973, and that both Senate and House Committees have conducted extensive hearings. It is stated that "many provisions in the pending legislation mirror proposals contained in the Association-approved package."

The activities of Congress, of the ABA, and of other organizations, for grand jury reform, might not have been necessary if the judiciary had performed its rightful function. We should not abdicate our own responsibilities to correct grand jury abuse.

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[1] GM had filed with the IRS affidavits detailing abuses and misconduct of IRS agents in visiting various GM plants and insulting its employees. GM alleges that the IRS never investigated these charges, but was using these same agents to testify before the grand jury and presumably they would be examined by the IRS attorney conducting the grand jury investigation.

As Mr. Justice Brennan well stated in his dissent in *Kremens* v. *Bartley*, 431 U.S. 119, 137 (1977):

> As was true three Terms ago with respect to another sensitive case brought to this Court, I can "find no justification for the Court's straining to rid itself of this dispute." *DeFunis* v. *Odegaard*, 416 U.S. 312, 349 (1974) (Brennan, J., dissenting). "Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases." *Id.* at 350.

The District Judge realized fully the gravity of this matter. It was evidenced in an exchange which took place between Government counsel and the Judge, and is illuminating:

> THE COURT: Why can't you take any Internal Revenue Service lawyer and make him a special attorney by appointment and turn the grand jury investigation over to him, let him run the whole show?
>
> MR. McBRIDE: Conceivably that could be done.
>
> THE COURT: You are saying that would be appropriate?
>
> MR. McBRIDE: Yes, your Honor, for this reason —
>
> THE COURT: I ought not be concerned with it?
>
> MR. McBRIDE: Again for this reason that the law, Section 515 and 543 of Title 28, does not put any limits on the authority of the attorney general. It puts him in control and GM, nor the Court, if I may be forgiven to say so, are not, I think, in a position, and GM should not be able to dictate who it will have conducting this grand jury or to assist in the conduct of this grand jury as it has also been trying to dictate who would be persons to assist the government attorneys and suggesting that we have other people. [A.261-62]

The panel majority answered the Government's contention as follows:

> As we have held, the power of appointment resides in the Attorney General or in his designated assistant. This power of appointment does not authorize the Attorney General, or his associate, to appoint an attorney who has a conflict of interest or an appearance of a conflict, nor does it immunize such an appointment so as to prevent judicial review. The courts have jurisdiction in a proper case to decide whether such conflict or appearance of conflict exists. (573 F.2d at 943)

In authorizing the interlocutory appeal the District Court certified:

> The undersigned is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this order as authorized by 28 U.S.C. § 1292(b) may materially advance the ultimate termination of this litigation.

GM filed in this Court a notice of appeal under 28 U.S.C. § 1291, which was docketed as a direct appeal (No. 77-1508), and a petition for leave to appeal under 28 U.S.C. § 1292(b). The Government filed a motion to dismiss the direct appeal. An administrative panel of this Court, consisting of Judges Weick, Edwards and Celebrezze, granted the Government's motion to dismiss the direct appeal. By the same order that panel allowed interlocutory appeal. It should not be necessary for GM to have two appeals pending here from the same order.[2]

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[2] It is astounding that the majority would endeavor to denigrate the panel's order by the statement:

> Without oral argument or conference consideration an administrative panel of said court consisting of Judges Weick, Edwards and Celebrezze, entered an order on October 3, 1977 dismissing General Motor's § 1291 appeal (No. 77-1508) but granting General Motor's *leave to proceed* under § 1292(b). [Italics mine].

It was *leave to appeal* which was granted.

The inference to be drawn from this statement is that the action of the panel did not receive adequate consideration. If the practice

The administrative panel probably should have deferred action on the motion to dismiss. It certainly could not foresee that an en banc court would undertake to vacate its grant of permission to appeal and hold that such permission had been improvidently granted after the case had been heard and decided on its merits by the regular panel to whom the appeal had been assigned.

Section 1292(b) permits an interlocutory appeal in a civil action. The ground for the Government's motion to dismiss was that a grand jury proceeding is not a civil action. The Government did not claim that the interlocutory appeal had been improvidently granted. The Government cites no authority holding that a grand jury proceeding is a criminal action. As Judge Celebrezze points out in his dissent, our Court has previously spoken twice on this important issue. *United States* v. *Neiberger,* 460 F.2d 290, 292 (6th Cir. 1972); *United States* v. *Calandra,* 455 F.2d 750, 752-53 (6th Cir. 1972), *rev'd on other grounds,* 414 U.S. 338 (1974).

In *Neiberger* we allowed the Government to appeal under § 1291 from an order of the District Court denying its application for a grant of immunity to grand jury witnesses. We stated:

> This is a final decision in a civil action and, hence, subject to appeal to this court.

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of not allowing oral arguments on motions is "not adequate," the fact is that the members of the en banc majority are equally responsible for adopting such a practice, or at least for permitting it to exist. The truth is, however, that the practice of not allowing oral argument on motions is prevalent in all of the Circuits, and even in the Supreme Court. We do not even allow oral arguments in all cases and in some Circuits many cases are decided on briefs.

As to conference consideration, this frequently occurs when the Court is in session. If no conference is held the Judges communicate by memos, or letters, which are sufficient.

As to the statement in the majority opinion that the Government filed a motion to vacate the panel opinion, I have not seen any such motion, and do not believe that a motion was filed. The Government did file a petition for rehearing en banc, which is governed by our Rule 3b.

Calandra also involved an appeal under § 1291 by the Government from an order entered in a grand jury proceeding.[3]

Neither *Calandra* nor *Neiberger,* as Judge Celebrezze points out, are mentioned in the majority opinion, and are being overruled *sub silentio.*

A grand jury proceeding does not become criminal as to a defendant until the grand jury returns an indictment against the defendant. As well stated in *Post* v. *United States,* 161 U.S. 583, 587 (1896):

> Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at least, by complaint before a magistrate.

See also Perlman v. *United States,* 247 U.S. 7 (1918).

The majority (in our case) states:

> Even if this appeal could be characterized as an appeal in a "civil action" within the meaning of § 1292(b), we would exercise our statutory discretion by dismissing this appeal since we do not believe that resolution of this issue at this time would "materially advance the ultimate termination of the litigation." The legislative history of the Interlocutory Appeals Act suggests that interlocutory appeals, even in civil cases, should be "sparingly granted." To allow an appeal when the District Court has refused to disqualify a government lawyer from a grand jury investigation simply disrupts the investigation and creates the possibility that the target of the inquiry – by the threat of delay and protracted legal maneuvering – will exert unwarranted influence in the government's choice of its prosecuting attorney.

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[3] In other cases the Government was successful in maintaining that a grand jury proceeding is a civil action. *See, e.g., United States* v. *Judson,* 322 F.2d 460 (9th Cir. 1963); *United States* v. *Doe (Gravel),* 455 F.2d 753 (1st Cir.), *vacated on other grounds,* 408 U.S. 606 (1972).

The majority overlooks the fact that an Administrative Panel of this Court had previously exercised its statutory discretion in allowing the interlocutory appeal after it had been duly certified by the same District Judge who had denied GM's motion to disqualify the IRS attorney. GM in reliance on the order allowing its interlocutory appeal, filed in this Court the record on appeal and its briefs and appendices. The appeal was assigned for hearing before a regularly constituted panel of this Court. The appeal was argued orally by counsel on both sides and submitted to the Court. The Court after consideration, decided the case on its merits and reversed the judgment of the District Court for error in denying GM's motion to disqualify the IRS attorney. It would appear to be unseemly for the en banc majority at this late date to undertake to re-examine the decision of the Administrative Panel (which had been entrusted by this Court with the power to hear and determine such matters) after the case had been heard and decided by the hearing panel on its merits.

Judge Gibbons has well stated the rule with respect to discretion in *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3rd Cir. 1974), at 756:

> The key consideration is not whether the order involves the exercise of discretion, but whether it truly implicates the policies favoring interlocutory appeal. The determination of what orders are properly reviewable under § 1292 (b) must be made by a practical application of those policies, not by a mechanical application of labels such as "discretionary" or "nondiscretionary." Those policies, both before and since the enactment of § 1292(b) have included the avoidance of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense. In this case, as subsequent discussion will disclose, there exists by virtue of the order appealed from both the possibility of prejudice to a party pendente lite and the possibility of considerable avoidable wasted trial time and litigation expense.

To the same effect, see *Melamed* v. *ITT Continental Baking Co.*, 534 F.2d 82, 84 (6th Cir. 1976).

It is also unfair to GM which undoubtedly relied on the order of the Administrative Panel granting leave to file its interlocutory appeal and dismissing its direct appeal. Had GM known that its interlocutory appeal would ever be dismissed by an en banc court because improvidently granted by the Administrative Panel, it would certainly have petitioned the Supreme Court for a writ of certiorari to review the order of the Administrative Panel dismissing its direct appeal. It ought not be necessary for GM to have two appeals pending to review a single order of the District Court. GM should not be prejudiced by unprecedented maneuvers of this Court.

It has not been the practice of this Court to treat orders allowing appeals made by Administrative Panels in the manner which was inflicted on GM in the present case. In *Cardwell* v. *Chesapeake & Ohio Ry. Co.*, 504 F.2d 444 (6th Cir. 1974), this Court in an opinion written by Circuit Judge McCree decided the merits of an interlocutory appeal in a F.E.L.A. suit for damages after an Administrative Panel of this Court had allowed the appeal. Judge McCree pointed out, however, for the benefit of District Courts and litigants that this particular use should not be made of the statute. *Cardwell* was cited in 16 Wright-Miller-Cooper-Gressman *Federal Practice and Procedure* § 3929, at 142 (1977) and the authors state:

> It does not make sense to vacate a grant of permission to appeal, however, if the appeal has been argued and the only purpose is to instruct litigants and district courts that a particular use should not be made of the statute. In such cases, the appeal should be decided, and the deterrent function can be served by a statement of future policy.
>
> [footnote:]
> Although the case was of the sort that should not

> give rise to an interlocutory appeal, and one judge had dissented from the grant of permission to appeal, "[n]evertheless, we have permitted the appeal, and to expedite the ultimate conclusion of this litigation, we consider the issue presented." *Cardwell* v. *Chesapeake & O. Ry.*, C.A. 6th, 1974, 504 F.2d 444, 447.

The majority in the present case further disagreed with the Administrative Panel when it stated its disbelief that resolution of the issue at this time would "materially advance the ultimate termination of this litigation". It may well be doubted whether there is any case in which an interlocutory appeal could more "materially advance the ultimate termination of the litigation" than in the present case. By declining to hear this appeal the majority is subjecting GM and the Government to a continuous grand jury investigation conducted by an attorney with a conflict of interest, with the attendant possibility of obtaining an invalid indictment, trial and conviction, before this issue of conflict of interest can be determined. The potential waste of time and money for both sides in such proceedings would be large. Both sides in the present case already must have expended considerable sums in GM's fruitless attempt to appeal, in which it used all known means, namely, direct and interlocutory appeals. In addition, any subsequent civil tax proceeding against GM might be invalidated because of this taint.

The allowance of the appeal to GM does not disrupt the grand jury as claimed, since the grand jury may proceed and hear other matters referred to it. *Cf. United States* v. *Wilson*, 421 U.S. 309, 318 (1975), opinion announced by Chief Justice Burger.

Nor is there any merit in the contention of the majority that the allowance of the appeal "will exert unwarranted influence in the Government's choice of its prosecuting attorney." The Government in this case has never claimed that

it has the right to appoint a special attorney who has a conflict of interest, to conduct a grand jury investigation.

The contention by the majority in this case that interlocutory appeals should be "sparingly" granted has no application to the present case. The appeal was certified by the District Judge who was in charge of the grand jury and had full knowledge of the seriousness of the issues and of the necessity for their early determination. His certification was approved by the Administrative Panel and also a majority of the Panel hearing the case on its merits. In all fairness, what more should be required?

The federal judiciary should be commended for the manner in which it has handled interlocutory appeals. Applications for a few more than one hundred interlocutory appeals are made each year and only about one-half are granted. The statute has not made serious inroads into the final judgment rule. 16 Wright-Miller-Cooper-Gressman *Federal Practice and Procedure* § 3929, at 133 (1977).

If there was any question about the majority not wanting to hear this appeal, the answer is found by reading footnote 2 on page 4 of its opinion, where the following language appears:

> General Motors argues in the alternative that we should assert appellate jurisdiction by treating this appeal as a petition for writ of mandamus under 28 U.S.C. § 1361 or § 1651. The Court does not reach or decide this question because General Motors has not applied for a writ of mandamus in this proceeding, and the District Judge has not received notice or had an opportunity to be heard and thus has not been made a litigant on this appeal.

As pointed out in the panel's opinion and the authorities there cited, it was not necessary for GM to file a mandamus action as the Court may treat the interlocutory appeal as a petition for a writ of mandamus under the All Writs Act. 573 F.2d at 940. Furthermore, GM has acquiesced in the panel's

treatment. The statement by the majority that the District Judge who is not a party to this appeal, has not received notice or had an opportunity to be heard, borders on the ridiculous.

The professed concern of the en banc majority for the District Judge is not understandable since the majority has discarded the District Judge's certification and dismissed the interlocutory appeal after an Administrative Panel of this Court had allowed the appeal and a regularly constituted panel assigned to hear the case had heard and decided the appeal on its merits. Such action by the majority in depriving GM of its right to appeal is not only unprecedented, it is also unbelievable.

It is further stated in the majority opinion that GM did not appeal from the order of the Administrative Panel dismissing its direct appeal. It may be properly assumed that the reason GM did not appeal from that panel's order was that it was unnecessary since the panel had granted GM leave to file an interlocutory appeal. Had GM any idea that its interlocutory appeal was going to be dismissed, it would undoubtedly have petitioned the Supreme Court for a writ of certiorari to review the dismissal of its direct appeal.

The fairness asserted by the majority in its even considering now GM's appeal under § 1291 and then denying it, relying on inapposite authorities, obviously was of no help to GM. All Courts are required to treat litigants fairly. Neither of the two cases cited by the majority as authority for again dismissing GM's direct appeal involved final orders. *Cobbledick* v. *United States*, 309 U.S. 323 (1940), involved only an order of the District Court denying a motion to quash a grand jury subpoena, which clearly was not a final order. *United States* v. *Ryan*, 402 U.S. 530 (1971), likewise involved an order (not final) of the District Court denying a motion to quash a grand jury subpoena duces tecum.[4]

[4] Mr. Ryan's conviction for obstruction of justice was reversed in *United States* v. *Ryan*, 455 F.2d 728 (9th Cir. 1971), which case is interesting because it did involve some grand jury abuse and other abuses which are pointed out in the opinion of the Court.

Coopers & Lybrand v. *Livesay*, 46 U.S.L.W. 4757 (U.S. June 21, 1978), is inapposite as its holding was that denial of only the class action aspects of a case was not appealable as it is not a final order.

The decision of the majority in dismissing GM's direct appeal on the ground that the order appealed from is not a final order, conflicts with a recent decision of our Court in *Melamed* v. *ITT Continental Baking Co.*, 534 F.2d 82, 84 (6th Cir. 1976), before Judges Peck, Miller and McAllister, stating:[5]

> Initially, we are confronted with the issue of whether the district court's order denying Continental's motion for disqualification of Winston & Strawn is appealable at this stage of the proceedings as a final decision of the district court pursuant to 28 U.S.C. § 1291. While this precise issue has not previously been before this Court, other circuits considering the question have generally concluded that an order denying a motion for disqualification is appealable under 28 U.S.C. § 1291. *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (en banc) (cases cited); see *Kroungold* v. *Triester*, 521 F.2d 763 (3d Cir. 1975); *Fullmer* v. *Harper*, 517 F.2d 20 (10th Cir. 1975); *Yablonski* v. *United Mine Workers*, 147 U.S.App.D.C. 193, 454 F.2d 1036 (1971) (dicta), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1609, 31 L.Ed.2d 816 (1972); *Uniweld Products, Inc.* v. *Union Carbide Corp.*, 385 F.2d 992 (5th Cir. 1967), *cert. denied*, 390 U.S. 921, 88 S.Ct. 853, 19 L.Ed.2d 980 (1968). *Contra*, *Cord* v. *Smith*, 338 F.2d 516 (9th Cir. 1964).
>
> In *Cord*, although an order denying a motion for disqualification was held not appealable under 28 U.S.C. § 1291, the court, treating the appeal from the order as

[5] It is not believable that the majority intended to overrule *Melamed sub silentio*.

a petition for a writ under the All Writs Act, 28 U.S.C. § 1651, stated at page 522:

> Continued participation as an attorney, by one who is disqualified by a conflict of interest from so doing, will bring about the very evil which the rule against his participation is designed to prevent, and a subsequent reversal based upon such participation cannot undo the damage that will have been done as a result of such participation. We therefore proceed to the merits.

In holding that an order denying a motion for disqualification was appealable, the court in *Silver Chrysler Plymouth, supra,* stated at page 805-06:

> . . . the order is collateral to the main proceeding yet has grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief. . . .
>
> By holding such an order directly appealable, we eliminate the uncertainties (and the paperwork) attendant to resorting to § 1292(b) and/or § 1651. Since the ultimate objective is to bring before an appellate court an important question which, if unresolved, might well taint a trial, why should not this question be presented before judicial and attorney time may have been needlessly expended?

We find the reasoning of *Silver Chrysler Plymouth* to be persuasive and hold the order in this case appealable because it is a "final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528, 1536 (1949).

Accord, Cleveland v. *Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193 (N.D. Ohio 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977).

In *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600, 605 (D.C. Cir. 1976), the Court stated in footnote 8:

> In the context of a trial rather than a grand jury proceeding, it has been held that an order *granting* a motion to disqualify counsel is a final judgment under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *E. g., Hull* v. *Celanese Corp.*, 513 F.2d 568, 570-71 (2d Cir. 1975); *Draganescu* v. *First Nat'l Bank*, 502 F.2d 550, 551 (5th Cir. 1974); *Richardson* v. *Hamilton Int'l Corp.*, 469 F.2d 1382, 1383 n. 1 (3d Cir. 1972), *cert. denied*, 411 U.S. 986, 93 S.Ct. 2271, 36 L.Ed.2d 964 (1973); *United States* v. *Hankish*, 462 F.2d 316, 318 (4th Cir. 1972) (dictum); *Brown* v. *Miller*, 52 U.S.App. D.C. 330, 286 F. 994 (1923) (attorney himself appeals; jurisdiction assumed without discussion). In fact, although there was originally some authority for the view that orders denying a motion for disqualifiaction were not appealable under *Cohen, e. g., Fleischer* v. *Phillips*, 264 F.2d 515, 516-17 (2d Cir.), *cert. denied sub nom., Fleischer* v. *Benjamin*, 359 U.S. 1002, 79 S.Ct. 1139, 3 L.Ed.2d 1030 (1959); *Marco* v. *Dulles*, 268 F.2d 192, 193 (2d Cir. 1959), the weight of recent authority is definitely in the direction of treating the denial of such motions as final orders, *e. g., Yablonski* v. *UMW*, 147 U.S. App.D.C. 193, 454 F.2d 1036, 1038 & n. 9 (1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1609, 31 L.Ed.2d 816 (1972) (order denying motion for disqualification appealable where the disqualification was predicated upon ethical considerations and "additionally upon significant impingement on a specific legislative policy"); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (en banc) (reviewing the cases); *Ceramco, Inc.* v. *Lee Pharmaceuticals*, 510 F.2d 268, 270-71 (2d Cir. 1975) (*citing Silver Chrysler Plymouth, supra*); *Kroungold* v. *Triester*, 521 F.2d 763, 765 (3d Cir. 1975); *American Roller Co.* v. *Budinger*, 513 F.2d 982, 983 (3d Cir. 1975); *Greene* v. *Singer Co.*, 509 F.2d 750,

751 (3d Cir. 1971); *United States* v. *Garcia*, 517 F.2d 272, 275 (5th Cir. 1975) (criminal trial); *Uniweld Prods., Inc.* v. *Union Carbide Corp.*,, [sic] 385 F.2d 992, 994 (5th Cir. 1967), *cert. denied*, 390 U.S. 921, 88 S.Ct. 853, 19 L. Ed.2d 980 (1968); *Tomlinson* v. *Florida Iron & Metal, Inc.*, 291 F.2d 333, 334 (5th Cir. 1961) (order denying motion for disqualification is final where "harm resulting therefrom is in the nature of the frustration of a public policy which cannot be avoided or mitigated by an appeal taken after the trial"); *Fullmer* v. *Harper*, 517 F.2d 20, 21 (10th Cir. 1975). *But see Cord* v. *Smith*, 338 F.2d 516, 521 (9th Cir. 1964).

We find ourselves in agreement with those cases holding that an order granting a motion for disqualification is appealable, and it is our view that the factors justifying that conclusion in the trial context are equally applicable to grand jury proceedings. Indeed, even if we were to conclude that the question of appealability was closer than we think it to be, we would be disposed to take a more expansive approach to the collateral order doctrine in the grand jury context than in the trial context since allowing such appeals is less likely to involve "the mischief of economic waste and of delayed justice," *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 2092 (1945). *Cf. United States* v. *Wilson*, 421 U.S. 309, 318, 95 S.Ct. 1802, 44 L.Ed.2d 186 (1975), in which Chief Justice Burger, writing for the Court, had an opportunity to compare trials and grand jury proceedings in terms of the obstruction that would be caused by requiring Rule 42(b) criminal contempt hearings for refusal to testify: "A grand jury ordinarily deals with many inquiries and cases at one time, and it can rather easily suspend action on any one, and turn to another while proceedings under Rule 42(b) are completed. . . . Trial courts, on the contrary, cannot be expected to dart from case to case any time a witness who has been granted immunity decides not to answer questions."

In addition to *In re Investigation Before the April 1975 Grand Jury, supra*, two other cases have explicitly held that an order disqualifying an attorney from representing witnesses before a grand jury is appealable under the collateral order exception. These cases are: *In re Investigation Before the Feb. 1977 Lynchburg Grand Jury*, 563 F.2d 652, 655 (4th Cir. 1977), and *In re Grand Jury Empaneled Jan. 21, 1975*, 536 F.2d 1009, 1011 (3d Cir. 1976). Two other cases have entertained such appeals without discussing jurisdiction: *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977), and *In re Gopman*, 531 F.2d 262 (5th Cir. 1976).

The majority refers to the rule prohibiting piecemeal appeals in criminal cases; but this is not a criminal case. Even in criminal cases piecemeal appeals have been allowed by the Supreme Court. In *United States* v. *MacDonald*, 46 U.S.L.W. 4395 (U.S. May 1, 1978), the Court said:

> This Court in criminal cases has twice departed from the general prohibition against piecemeal appellate review [citing *Abney* v. *United States*, 431 U.S. 651 (1977), and *Stack* v. *Boyle*, 341 U.S. 1 (1951)]. In each instance, the Court relied on the final judgment rule's "collateral order" exception articulated in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545, 547 (1949).

By authority of *Cohen*, GM's appeal under § 1291 was proper and the Administrative Panel should not have dismissed it. *Melamed* v. *ITT Continental Baking Co., supra*; *In re Investigation Before 1975 Grand Jury, supra*. The majority erred when it reconsidered GM's § 1291 appeal and dismissed it.

The majority further contends that GM has a remedy of appeal if it is convicted of a crime and may also appeal from any unauthorized use of grand jury materials by the IRS. But this would involve protracted and very expensive litigation, both for GM and for the Government, which litigation the interlocutory appeal is designed to avoid. *Kraus* v. *Board of County Road Comm'rs*, 364 F.2d 919, 921 (6th Cir. 1966)

(approving resolution adopted by Judicial Conference of the United States relating to interolcutory appeals). *Melamed* v. *ITT Continental Baking Co., supra*; *In re Investigation Before 1975 Grand Jury, supra.*

An appellate court has the power to review by mandamus an issue of first impression involving a basic undecided problem. *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964); *United States* v. *United States District Court*, 444 F.2d 651, 656 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972). Surely this is such a case.

II.

The majority did not pass upon the issue of disqualification of Mr. Piliaris, no doubt because it ruled it had no jurisdiction. Any ruling which it would make on the merits of the case would have been *obiter dicta*.[6]

It appears that the appointment of an agency attorney as a Special Attorney to conduct a grand jury investigation in a matter which the agency attorney has instigated, and in which he had been previously involved, is not an isolated incident. In the panel majority opinion we cited the case of *United States* v. *Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977), where a similar situation existed with an attorney, formerly employed by the Civil Aeronautics Board, who had been appointed as Special Attorney to conduct a grand jury investigation concerning the very subject upon which he had previously passed while in the employ of the Board. The District Court granted defendant's motion to dismiss the indictment because of this impropriety, holding that the attorney was an unauthorized person to appear before the grand jury.

[6] The role of Mr. Piliaris was shown by uncontroverted evidence. The avoidance of harm to a party *pendente lite* from a possibly erroneous interlocutory order and the possibility of wasted trial time and large litigation expense both to the party and to the Government surely satisfies all the legal requirements for an interlocutory appeal. *Katz* v. *Carte Blanche Corp., supra*; *Melamed* v. *ITT Continental Baking Co., supra.*

The en banc majority should therefore exercise its rightful jurisdiction and on the uncontroverted evidence re-enter the judgment of the hearing panel.

The *amicus curiae* brief filed by the law firm of Edward Bennett Williams refers to still another case involving similar facts. In that case, No. 77-CR-1073 presently pending in the United States District Court for the Northern District of Illinois, Velsicol Chemical Corporation has moved to dismiss an indictment pending against it and several of its present and past employees, on the ground that an Environmental Protection Agency (EPA) attorney, who was appointed as a Special Attorney to conduct the grand jury investigating the defendants, previously had substantial connection, as an EPA lawyer, with the matter under grand jury investigation.

If attorneys for the IRS, the Civil Aeronautics Board, and the EPA, all with conflicts of interest, may be appointed as Special Attorneys to conduct grand jury investigations, this practice can soon spread to all of the many agencies of the federal government.

SEC attorneys were recently rebuffed in their attempt to obtain disclosure of evidence developed in a grand jury investigation in which the SEC was interested. The Court held that these attorneys were not attorneys for the Government as defined in Rule 54(c) Fed. R. Crim. P. *In re Grand Jury Investigation*, 414 F. Supp. 74, 76 (S.D. N.Y. 1976).

A similar ruling was made with respect to attorneys for the Federal Trade Commission in *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3d Cir. 1962). The Court rejected the argument that the agency attorney and the Department of Justice attorney were attorneys for the same client, namely, the United States. The *amicus* brief points out:

> Different departments and agencies of the federal government represent and reflect different economic, social and political interests which are frequently in opposition.

This was the situation in the case in which Mr. Williams' firm

was involved where the Secretary of Agriculture disagreed with the EPA and litigation ensued. Amicus brief, p. 10, 11.

State courts have disqualified prosecuting attorneys from trying criminal cases where they have a conflict of interest. The disqualification is based upon violation of the constitutional right of the defendant to a fair and impartial trial.

In *People* v. *Superior Court of Contra Costa County,* 19 Cal. 3d 255, 561 P.2d 1164, 137 Cal. Rptr. 476 (1977), the Superior Court disqualified the prosecutor from proceeding in a murder case in which the victim's mother was employed in the office of the prosecutor. The California Supreme Court in a unanimous opinion affirming, stated:

> A fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law. [Citing authority].
>
> It is the obligation of the prosecutor, as well as of the court, to respect this mandate. [Citing authority]. . . . As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. [Citing authority]. (561 P.2d at 1171)

This same twofold duty had previously been announced by the Supreme Court in *United States* v. *Calandra,* 414 U.S. 338 (1974). Mr. Piliaris, as attorney for the IRS, was under no such duty. He never should have been appointed as Special Attorney to conduct the grand jury investigation of GM.

The California Supreme Court further stated:

> We have so far examined the problem of prosecutorial impartiality largely from the perspective of the accused. Society also has an interest in both the reality and the appearance of impartiality by its prosecuting officials: "It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that

> such officials avoid, as much as is possible, the appearance of impropriety." (Fn. omitted.) (*People* v. *Rhodes* (1974) 12 Cal.3d 180, 185, 115 Cal.Rptr. 235, 239, 524 P.2d 363, 367.) Similar considerations led the American Bar Association to adopt, in its Standards Relating to the Prosecution Function, a provision that "A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties." (Approved Draft 1971, pt. 1, std. 1.2.)
>
> For all the foregoing reasons we conclude that a trial judge may exercise his power to disqualify a district attorney from participating in the prosecution of a criminal charge when the judge determines that the attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary functions of his office. [Footnote omitted.] (561 P.2d at 1173)

Murderers and persons with long criminal records have secured protection of their constitutional rights by the Supreme Court and other federal courts. *See, e.g., Lockett* v. *Ohio,* 46 U.S.L.W. 4981 (U.S. July 3, 1978); *Bell* v. *Ohio,* 46 U.S.L.W. 4995 (U.S. July 3, 1978); *United States* v. *Doss,* 563 F.2d 265, 282 (6th Cir. 1977) (en banc) (Weick & Engel, JJ., dissenting); *Flynt* v. *Leis,* 574 F.2d 874 (6th Cir. 1978), *petition for cert. filed,* 47 U.S.L.W. 3027 (U.S. Aug. 8, 1978) (No. 77-1618). (Federal District Court injunction restrained state court criminal trial of obscenity case notwithstanding provisions of 28 U.S.C. § 2283.) Wealthy persons and large corporations with millions of shareholders, such as GM, have constitutional rights which are just as dear to them, and they are equally entitled to protection of those rights from violation.

The authorities cited herein demonstrate that the en banc majority opinion not only conflicts with the settled and well-established law of the Sixth Circuit, which the majority has apparently overlooked as it is not even discussed, but its opinion is also against the great weight of authority.

The salutary doctrine of *stare decisis* ought not to be ignored.

In sum, the ruling of the majority in dismissing GM's direct appeal was clear error because the order appealed from was a final order appealable under § 1291.

The dismissal of the interlocutory appeal was error.[7]

The judiciary should not shirk the performance of its responsibilities to all persons alike who are entitled to the equal protection of the law, due process of the law and a fair and impartial grand jury proceeding.

This Court should take jurisdiction and reverse the judgment of the District Court denying GM's motion to disqualify, as was ordered by the Panel that heard the case on its merits.

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[7] The concurring opinion of our learned colleague Judge Edwards is curious. Although it agrees with Judge Merritt's majority opinion that this Court lacked jurisdiction, Judge Edwards states that the Court did have jurisdiction properly to consider the merits of the case under the All Writs statute, 28 U.S.C. § 1651. The trouble is, Judge Merritt did not exercise that jurisdiction and did not consider the appeal and pass upon the merits. Judge Edwards then undertakes to exercise that jurisdiction and to consider the appeal on its merits, under the All Writs Act, and determined as a matter of law that no conflict of interest was shown by the evidence, and therefore jurisdiction should not be exercised and the appeal therefore should be dismissed.

I respectfully submit that Judge Edwards' treatment of the case conflicts with Judge Merritt's opinion. If this Court really lacked jurisdiction of the appeal, Judge Edwards was without jurisdiction to pass upon the merits of the case and his rulings are pure dicta. Furthermore, if it was determined that GM's appeal failed on its merits, the judgment of the District Court should have been affirmed rather than GM's appeal dismissed for lack of jurisdiction.

The fact that the District Court granted GM's motion for a protective order is not relevant to the issue whether the IRS attorney should have been disqualified for conflict of interest, nor does it adequately protect the rights of GM.

Our citizens who are being investigated by a grand jury surely have the right to object to an attorney on the payroll of the victim of the alleged fraud conducting the grand jury proceedings, and this injustice should be stopped by the courts as soon as the issue is presented, not delayed while the citizens are continuously subjected to this improper treatment.

[EXCERPTS FROM AMERICAN BAR ASSOCIATION JOURNAL – MARCH, 1978]

REMEDY FOR THE GRAND JURY: RETAIN BUT REFORM

The Association has endorsed a comprehensive set of proposals for grand jury reform. The most controversial is permitting counsel for a witness in the grand jury room.

By Richard E. Gerstein and Laurie O. Robinson

Last year the press reported on charges of grand jury abuse and assertions that a grand jury's functions had been distorted to pursue illegitimate ends. Were these accusations voiced by antiwar activists, the Harrisburg Eight, or organized crime? No. They came from General Motors, and G.M. is not alone. Litton Industries, Bethlehem Steel, and the National Council of Churches, among other well-established groups, have joined the call for grand jury reform.

The grand jury needs attention. Grand jury proceedings constitute the one stage of the criminal justice process that has escaped the due process scrutiny to which other aspects of the system have been subjected during the past two decades.

Many attacks have been leveled at the grand jury in recent years. Critics charge that it has departed radically from its proper constitutional function of protecting citizens from unwarranted prosecution and has evolved into a prosecutorial tool devoid of due process. Allegations have been made that the Nixon administration used the grand jury for political, rather than law enforcement, purposes.

The American Bar Association's House of Delegates stepped into this controversy last August by overwhelmingly endorsing a comprehensive set of proposals for grand jury reform. These recommendations could change and give renewed life to the grand jury at both federal and state levels. This action has

given impetus to legislation pending in the Congress. It will help to accelerate consideration of similar bills before state legislatures.

Is the grand jury obsolete? Should it be abolished? The Association has rightly opposed efforts to discard it as an anachronism. It should be retained, but with revamping to ensure fairness. The key role grand juries played during the Watergate scandal is testament to their vital part in our criminal justice system. The grand jury can perform an important function in investigating complex crimes, but the missing ingredient of adequate due process must be added.

Fairness Needs to Be Restored

The measures endorsed by the Association can help to save the grand jury from extinction by restoring fairness while preserving its legitimate functions.

The grand jury is an institution embodied in our common law traditions. It emerged in England in the twelfth century. Scholars dispute whether it was originally a body to further the king's powers or to serve as a protective shield between citizen and crown. Probably it served both functions, protecting citizens who were objects of governmental suspicion and providing an effective investigatory tool to ferret out criminal activity. When the colonists brought the grand jury to this country, however, it was clearly viewed as a citizen's body that could protect them from the whims of the royal governors and English tyranny. The requirement for indictment is embodied in the Constitution, thus mandating use of the grand jury to this day in all federal criminal cases.

But the institution has undergone a continuing evolution since its beginning. England abolished the grand jury in 1933. Many states have revised its functions. While no state has completely eliminated indictment as a means of initiating criminal prosecutions, a majority now allow prosecution by other routes as well. Some rarely use a grand jury, and several

—Connecticut, Kansas, Michigan, Washington, and Wisconsin—have created "one-man" grand juries, granting a judicial officer many powers ordinarily associated with the grand jury.

Detractors of the grand jury and current practices claim it is an unsupervised strong arm of the prosecution. They contend that it is shielded from public scrutiny, unregulated by the courts, virtually unlimited in its subpoena powers, able to question witnesses behind closed doors, and capable of jailing recalcitrant witnesses without trial. They claim the grand jury no longer serves any protective function and that the minuscule percentage of "no bills" reflects reality: that the grand jury is only a rubber stamp for the prosecution.

The grand jury reform package adopted by the House of Delegates contains twenty-five legislative principles. These recommendations, if implemented, can restore fairness to the grand jury system. Counsel would be permitted to accompany a witness inside the grand jury room. A grand jury would not be allowed to name unindicted coconspirators or issue reports denigrating a person's normal fitness to hold office. Judicial review of grand jury reports would be provided prior to publication, with opportunity for persons discussed to seek expungement. Transactional, not the much more limited "use," immunity would be granted. The target of a grand jury investigation would in most instances be given the opportunity to testify. A grand jury subpoena would be returnable only when the grand jury is sitting and would identify the general subject area of the investigation. All grand jury proceedings, except the jurors' deliberations, would be recorded. A prosecutor would not be allowed to use the grand jury to assist in an administrative inquiry or to obtain evidence against an already-indicted person. Witnesses would be protected against harassment, unreasonable delays, and repeated appearances. They would not be required to parade before television cameras and the public to enter the grand jury room to testify.

These reform proposals, drafted by the Section of Criminal Justice's Committee on the Grand Jury, have drawn sharp

attack. Opponents argue that they will seriously weaken the grand jury and impede and impair its functions.

The fiercest debate has centered on the principle that would allow counsel into the grand jury room. Federal prosecutors – the Department of Justice and United States attorneys around the country – have asserted that this would disrupt and delay grand jury investigations.

Opposition Arguments Are Weak

A more detailed examination of this recommendation, since it is a central thrust of the reform package, will illustrate the need for its implementation and the weakness of arguments in opposition.

It is surprising that this proposal is perceived as so radical that it prompted a personal appearance by Attorney General Griffin B. Bell to oppose it on the floor of the House of Delegates. Eleven states already allow counsel to accompany a witness before the grand jury. One of these, Michigan, is now considering broadening the practice, based on good experience with its present provision, which allows counsel before "one-man" grand juries. Last summer Colorado passed a comprehensive grand jury reform bill with the backing of Denver district attorney Dale Tooley. Massachusetts has just passed legislation allowing counsel inside the grand jury room. New York and California are considering legislation of this nature; in California it has the support of Evelle Younger, the law enforcement minded attorney general.

The American Law Institute has supported counsel for witnesses in its Model Code of Pre-Arraignment Procedure. In the commentary to the code, the A.L.I. pointed out that "complex and important legal issues face a witness before the grand jury. An appearance before that body may subject an individual to the grave danger of self-incrimination or imprisonment for contempt. . . . The witness may also inadvertently lose his right to claim the privilege by operation of the doctrine

of waiver. . . . And the inherent pressure and accompanying nervouseness of a grand jury appearance upon an individual may make it very difficult for him to remember his attorney's instructions."

Counsel Is Guaranteed

Why should a lawyer be allowed to enter the grand jury room with his client? The question would more appropriately be asked in the reverse–why not? Almost nowhere else in the criminal justice system is a person who wants a lawyer denied that right. A line of landmark cases from *Powell* v. *Alabama* to *Miranda*, *Wade*, *Gilbert*, and *Argersinger*, relying on requirements of the Sixth and Fourteenth amendments, have guaranteed the presence of counsel at every other critical stage of criminal proceeding.

Not having counsel present leaves a grand jury witness poorly protected. The lay witness is at a considerable disadvantage, having to make judgments even the most seasoned lawyer would find difficult. He is forced to make decisions, even while testifying, that will legally bind him. His testimony can later be used at trial to impeach him. He unwittingly can waive the privilege against self-incrimination. If he refuses to testify after receiving immunity, he subjects himself to imprisonment without trial.

Awkward Position for Witness

Under present practice, a grand jury witness who needs to consult counsel is put in an awkward position. He must ask permission, get up, go outside the grand jury room, repeat the question to his attorney, and then return. The process is inefficient and ineffective, as well as prejudicial to the witness. It annoys grand jurors and raises speculation in their minds as to the purposes of the consultation.

Charles Ruff, the last Watergate special prosecutor, testified before a congressional committee that "the mere possibility

of occasional disruption simply cannot overcome the right of the individual witness to consult his attorney without going through the mildly absurd process of leaving the grand jury room every time. Indeed," he continued, "most prosecutors would admit . . . that they count on the burden of leaving the room to dissuade the witness from asserting his right to counsel."

There is another "catch-22" in the right to counsel. The Court of Appeals for the Seventh Circuit has held that a prosecutor who grants a witness permission to leave the grand jury room to confer with counsel may later raise this fact as relevant to the perjury charges against the defendant. A dissenting judge decried the government's being "permitted to 'sandbag' him [the defendant] by using the fact that he consulted his attorney against him." *United States* v. *Kopel*, 552 F. 2d 1265 (1977).

Other courts—the Fifth Circuit, for example—have said a limit can be placed on how frequently the witness leaves the room to consult counsel. *In re Tierney*, 465 F. 2d 806 (1972).

Advocates of retaining the present practice assert that allowing a lawyer inside the grand jury room will disrupt its proceedings. They argue that "lawyers will lawyer." Yet, under the Association's proposal, the lawyer's role would be stringently limited. The lawyer could only advise the client, not take part in the proceedings. The lawyer may be present only while the client is testifying. The court could order the removal of a disruptive counsel.

Attorney General Bell has asserted that "minitrials" will result if lawyers sit with their clients in the grand jury. The facts, however, speak otherwise. Practitioners, prosecutors, and judges in the states that already allow this practice report no problems. Lawyers attend many proceedings and quietly sit by and advise their clients without trying to take over the session. Mr. Bell's view reveals little faith in members of the bar. Lawyers are fully capable of restrained, professional conduct in handling these proceedings.

The attorney general also has claimed that this proposal constitutes a "Lawyers' Relief Act." This argument, while good rhetoric, is baffling: whether the lawyer is sitting outside the grand jury room door or inside beside the client, how is the number of lawyers involved changed?

Opponents raise other arguments as well. They claim that a breach in the secrecy rule will result. According to Acting Deputy Attorney General Benjamin Civiletti, letting the attorney into the grand jury room would constitute "an additional source of leaks." This argument sounds good, for who could oppose preservation of grand jury secrecy? But it is poorly based. Rule 6(e) of the Federal Rules of Criminal Procedure specifies that a witness can tell his attorney everything that occurred during his appearance. The lawyer would hear nothing that his client is not already free to tell him.

Critics also maintain that the presence of the witness's lawyer will restrict free testimony in cases involving political corruption, organized crime, and complex economic crime. But the states that already allow counsel into the grand jury chamber in most instances have retained the grand jury as an investigatory body for precisely these kinds of investigations. There are alternate ways of securing a co-operative witness's statement. Evidence can be summarized for the grand jury in the form of hearsay, under *Costello* v. *United States*, 350 U.S. 359 (1956). As experienced prosecutors know, very few witnesses decide to co-operate without their lawyer's knowledge. If the witness's testimony is helpful to the government, that fact will quickly become evident to the attorney from the amount of time spent in the grand jury room.

To meet one well-based concern, the Association's recommendations contain a strong statement on multiple representation of witnesses. Recognizing that problems arising from multiple representation could be exacerbated by allowing counsel into the grand jury room, the proposals contain a principle providing that a lawyer should not continue multiple representation in a grand jury proceeding if the exer-

cise of his independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his representation of another. If the court determines that this principle is not being followed, it would have the authority to order separate representation.

Back in the twelfth century, perhaps, or in eighteenth century America, when grand jurors were the witness's neighbors, the body traditionally served as the witness's protectors. Law was simple then and in many instances not committed to writing. Most citizens who served on a grand jury lived and died in the same community; they knew their neighbors. But today the modern investigatory grand jury is an arm of the prosecution. Laws are complex, and even the most assertive lay grand juror is to some degree intimidated by the professionalism, *expertise*, and authority of the prosecutor. It is naïve to assume that grand jurors still fulfill their original role, although this is a convenient argument for defenders of the present system.

The background of the Association's grand jury reform proposals explains their sound basis and practical nature. The Criminal Justice Section's Committee on the Grand Jury, which worked for about three years on the draft, reflected the section's "umbrella" makeup. It included prosecutors, defense counsel, law professors, and judges, most of whom had extensive prosecutorial experience. The committee included Charles Ruff; one of the original Watergate prosecutors, Seymour Glanzer; and the former district attorney of Manhattan, Richard Kuh.

Prospects for congressional action on grand jury legislation appear to be improved. Congress has been looking into charges of grand jury abuse since 1973. Both House and Senate judiciary subcommittees have held extensive hearings. In the House Joshua Eilberg, Democrat of Pennsylvania, and John Conyers, Democrat of Michigan, have sponsored bills, as has James Abourezk, Democrat of South Dakota, in the Senate. The committees have received testimony from a wide

spectrum of witnesses, including federal judges and prosecutors, practicing lawyers, legal scholars, and professional groups like the National District Attorneys Association. Organizations that seek broader change, such as the Coalition against Grand Jury Abuse, have also appeared. Many provisions in the pending legislation mirror proposals contained in the Association-approved package.

Changes Being Considered

It is encouraging that many states are now considering changes in their grand jury procedures. The Department of Justice is revising the *United States Attorneys Manual* to spell out more specifically the proper limits of prosecutorial conduct. This is long overdue. During development of the Criminal Justice Section's recommendations, the Grand Jury Committee met with representatives of the Justice Department and successfully hammered out a number of compromises. At the House of Delegates' session in August, the department supported twenty of the principles as finally drafted.

During this year the Section of Criminal Justice will work closely with the Committee on Association Standards for Criminal Justice to prepare standards and back-up commentary on the grand jury.

Opponents of change fear that massive obstacles will be thrown up in the path of complex criminal investigations, making the job of law enforcement harder. But preservation of the grand jury's efficiency cannot be sufficient justification to allow it continued carte blanche with the rights of witnesses and of those it is investigating. Efficiency has never been the sole guiding procedural rule in our system.

Reform of grand jury procedures will help to retain the grand jury. It will help to restore it to its role as a citizens' body—one of the last ways in which laymen actually participate in our criminal justice system. It should serve as an aid to the prosecutor, but not as his lackey.

In re April 1977 Grand Jury Subpoenas No. 77-1599

The grand jury is a long-standing part of our legal tradition written into our Constitution. But it is not sacrosanct. It needs the same attention every other phase of the criminal justice process has received. As a matter of fairness, we need to revamp and rejuvenate the grand jury.

No. 77-1599 Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In Re April 1977
Grand Jury Subpoenas

GENERAL MOTORS CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL from United States District Court for the Eastern District of Michigan.

Decided and Filed April 5, 1978.

Before: WEICK, CELEBREZZE and MERRITT, Circuit Judges.

WEICK, Circuit Judge, delivered the opinion of the Court, in which CELEBREZZE, Circuit Judge, joined. MERRITT, Circuit Judge, (pp. 16-24) filed a separate dissenting opinion.

WEICK, Circuit Judge. General Motors Corporation (GM) has perfected an interlocutory appeal to this Court from an order of the District Court denying GM's motion for a protective order seeking *inter alia* the disqualification of Meno W. Piliaris, an Internal Revenue Service (IRS) attorney, from participating in the conduct of a grand jury proceeding investigating alleged income tax evasions by GM. GM contends that such participation by Piliaris is unlawful and creates a conflict of interest or an appearance of such a conflict.

I

THE FACTS

During a 1975 audit by IRS of GM's 1972 income tax returns questions arose concerning the propriety of GM's deductions from income of the cost of expense materials when purchased.[1] IRS was of the view that expense materials which were on hand and unconsumed at the end of the tax year on December 31, 1972 should have been treated as inventory; and that if such materials were treated as expenses when purchased the expense should have been decreased by the amount of expense materials on hand or unconsumed on December 31, 1972, thereby increasing the amount of taxable income. IRS requested GM to determine its inventory of expense materials as of December 31, 1975; and this figure was to be extrapolated back to 1972 to arrive at an estimated inventory for that year.

GM conducted the survey. IRS, however, questioned its accuracy. GM contends that agents of IRS began a series of visits to the plants of GM, and they berated GM employees, using abusive tactics and improper behavior. GM filed affidavits with IRS relative to this misconduct, but GM asserts that IRS made no investigation. IRS, believing that GM employees had falsified the survey, stopped routine audit functions and the case was referred to the Intelligence Division of IRS for an investigation to determine whether false or fraudulent statements were made to it, in violation of 18 U.S.C. § 1001.

Special agents of the Intelligence Division made several requests for the production of records and documents. When certain records were not produced, a recommendation was made to the Justice Department that a grand jury investigation

[1] Expense materials are those items which are used in production but which do not become a part of the finished product, such as spare parts for machinery.

be made to determine possible violations of the criminal laws by GM.

In February 1977 such an investigation was approved. Willard McBride and Robert Forrest, attorneys from the Tax Division, Department of Justice, were appointed as special attorneys to conduct the grand jury investigation. They in turn sought the assistance of Piliaris, who was an attorney and accountant employed by the Office of Regional Counsel, Internal Revenue Service in Cincinnati, Ohio, and who was familiar with the GM income tax investigation. He had drafted the letter from the Regional Counsel to the Justice Department recommending a grand jury investigation. The letter stated that at the appropriate time IRS would request an order from the Court authorizing the disclosure of grand jury information to IRS. Piliaris also drafted a memorandum describing a meeting in which he participated and in which IRS planned its handling of the GM matter in coordination with the proposed grand jury proceedings. He was also familiar with the nature of the criminal investigation. On April 15, 1977 Piliaris was designated by Acting Associate Attorney General Modlin as a special attorney for the United States, empowered to assist in conducting the proceeding before the grand jury, although counsel admitted that he remained on the payroll of IRS.

Numerous grand jury subpoenas were served on GM and on GM employees. GM responded by filing motions to quash and for a protective order which asked the District Court to prohibit the disclosure of grand jury evidence to IRS employees. As a result of these motions the Government suspended the grand jury investigation to await the District Court's ruling on the motions. Subsequently GM learned of the contemplated use of IRS attorney Piliaris as a special attorney before the grand jury. GM then filed a motion seeking an order prohibiting Piliaris from participating in conducting the proceeding, or scrutinizing grand jury materials.

The District Court on June 30th entered orders denying GM's motions with respect to the subpoenas and the disqualifi-

cation of Piliaris, and granted in part GM's motion for a protective order with regard to the disclosure of grand jury evidence to IRS agents assisting the investigation.

GM filed both a notice of appeal and a motion for a stay of the grand jury proceeding pending appeal. The District Court denied the motion for a stay; and GM immediately filed in this Court a motion to stay the grand jury proceeding. Circuit Judge Engel denied the motion for a stay on the ground that no final appealable order had been entered.

The grand jury investigation then resumed with Piliaris's active participation.

GM filed a motion requesting the District Court to amend the orders of June 30th to include a statement allowing an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). This motion was denied with respect to all of the Court's orders except the one denying GM's motion to disqualify Piliaris from conducting the grand jury proceeding. The District Court accordingly amended its order of June 30th so as to provide:

> The undersigned is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this order as authorized by 28 U.S.C. § 1292(b) may materially advance the ultimate termination of this litigation.

This Court granted the Government's motion to dismiss GM's direct appeal of the District Court's orders on the ground that the orders were not appealable. In the same order we granted leave to GM to appeal under 28 U.S.C. § 1292(b) from the order denying GM's motion to disqualify Piliaris from acting as a Government attorney in the presentation of the case before the grand jury.

II

JURISDICTION

At the outset the Government contends that we have no jurisdiction of the interlocutory appeal under Section 1292(b). It asserts that this section by its express terms applies only to *civil* actions, and that a grand jury investigation is a criminal proceeding and is not a civil action. The Government has not cited a single case to us which so holds. Interlocutory appeals under Section 1292(b) were allowed in the following cases: *In Re Grand Jury Impaneled Jan. 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *In Re Grand Jury Investigation*, 338 F. Supp. 1379 (W.D. Pa. 1972).

A grand jury proceeding constitutes "a judicial inquiry." *Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940). It is a grand inquest with powers of investigation and inquisition. The function of the grand jury is to determine whether there is probable cause to believe that a crime has been committed and to protect citizens against unfounded criminal prosecutions. *United States* v. *Calandra*, 414 U.S. 338 (1974), *aff'g* 455 F.2d 750 (6th Cir. 1972); *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). The proceeding becomes criminal as to a defendant when the grand jury returns an indictment against him. *Post* v. *United States*, 161 U.S. 583, 587 (1896).

Merely because a witness has been subpoenaed to testify and to bring his records before a grand jury, does not involve the witness in a criminal action. If the witness refuses to answer a question on the ground that it tends to incriminate him, and the Court finds him guilty of contempt, he has the right to a direct appeal under Section 1291. *In Re Grand Jury Impaneled Jan. 21, 1975, supra.*

Where the witness files a motion to quash a subpoena duces tecum on Fifth Amendment grounds, the Court, instead of finding him guilty and punishing him for contempt, from which a direct appeal could be taken, may certify an inter-

locutory appeal under Section 1292(b). *In Re Grand Jury Investigation, supra.*

Even in a criminal case where a witness had been served with a subpoena duces tecum to bring his tapes and other records, and the Court denied a motion to quash, the Supreme Court held that the witness was entitled to a direct appeal from the order rather than to be subjected to a contempt charge. *United States* v. *Nixon,* 418 U.S. 683 (1974).[2] *Cf. Perlman* v. *United States,* 247 U.S. 7 (1918) (1st Syl.).

The proceedings before the grand jury thus far have been protracted. They should not be converted into a minitrial. If we hold that GM has no right of appellate review GM and the Government could be subjected to a protracted trial and considerable unnecessary expense if an indictment results and the trial court or this Court, on review, holds that the procedure followed was unlawful. Judicial supervision should prevent a wrong before it occurs.

But we need not determine this issue anew because another panel of this Court has considered the Government's motion to dismiss GM's direct appeal under Section 1291 and GM's petition for leave to file an interlocutory appeal under Section 1292(b). The issues were fully briefed and the same contentions made by the parties before that panel are repeated here. The panel granted the Government's motion to dismiss GM's appeal and also granted GM's petition for leave to file an interlocutory appeal. GM filed its interlocutory appeal pursuant to the order of this Court. We decline to vacate the order allowing the interlocutory appeal.

[2] In the dissenting opinion filed by Circuit Judge Merritt he undertakes to distinguish *Nixon* on the ground that that case involved the President of the United States; but if the Appellate Court was without jurisdiction of Mr. Nixon's appeal, the fact that Mr. Nixon was President would not confer appellate jurisdiction upon the Court. Any private citizen, including GM, would be entitled to the same treatment as Mr. Nixon, and to deny that treatment would deprive the citizen of due process of law and of the equal protection of the law.

Even if the order sought to be reviewed is nonappealable under Section 1291 or under Section 1292(b), we hold that the issues presented are subject to review by mandamus, and accordingly we treat this interlocutory appeal as a petition for a writ of mandamus under the All Writs Statute, 28 U.S.C. § 1651. *Young Properties Corp.* v. *United Equity Corp.,* 534 F.2d 847, 854 (9th Cir.), *cert. denied,* 429 U.S. 830 (1976); *United States* v. *Briggs,* 514 F.2d 794, 808 (5th Cir. 1975); *Application of Johnson,* 484 F.2d 791, 794 n.2 (7th Cir. 1973); *In re Harmon,* 425 F.2d 916, 918 (1st Cir. 1970); *International Prods. Corp.* v. *Koons,* 325 F.2d 403, 407 (2d Cir. 1963); *International Nickel Co.* v. *Martin J. Barry, Inc.,* 204 F.2d 583, 585 (4th Cir. 1953); *Shapiro* v. *Bonanza Hotel Co.,* 185 F.2d 777, 779 (9th Cir. 1950).[3]

Courts of Appeals, pursuant to their supervisory powers, may review in a mandamus proceeding questions of unusual importance necessary to the economical and efficient administration of justice. *Schlangenhauf* v. *Holder,* 379 U.S. 104 (1964); *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249, 259-60 (1957). *See Will* v. *United States,* 389 U.S. 90, 107 (1967).

Such supervisory jurisdiction may arise to correct errors or abuses of discretion on the part of the District Courts in connection with grand jury proceedings. *Application of Johnson, supra* at 795; *United States* v. *United States Dist. Court for the S. Dist. of W. Va.,* 238 F.2d 713, 719 (4th Cir. 1956); *cf. United States* v. *Briggs, supra; Continental Oil Co.* v. *United States,* 330 F.2d 347, 349 (9th Cir. 1964).

Clearly this is an exceptional case. If GM's assertion concerning the impropriety of Piliaris's presence before the grand jury is correct, not only will a great waste of both time and money ensue in permitting the grand jury to continue its investigation, but such waste will be substantially enlarged if an indictment is returned and GM is forced to go to trial.

[3] Despite this wealth of authority, the dissent would deny this Court its right to exercise its supervisory powers under the All Writs Act.

If this is not enough, this appeal presents important issues of first impression. As was stated in *United States* v. *United States Dist. Court for the E. Dist. of Mich., S. Div.*, 444 F.2d 651, 656 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972), quoting from *Schlangenhauf* v. *Holder, supra* at 110:

> The courts of appeals have the power to review by mandamus "an issue of first impression" involving a "basic undecided problem."

Cf. Thermtron Prods., Inc. v. *Hermansdorfer*, 423 U.S. 336, 352-53 (1976).

In *United States* v. *King*, 482 F.2d 768 (D.C. Cir. 1973), it was held:

> An accused who has been deprived of a substantial right at his preliminary hearing can seek relief by way of habeas corpus or mandamus.

III

AUTHORITY TO APPOINT SPECIAL ATTORNEYS

GM has questioned the authority of the Attorney General to appoint an administrative agency attorney such as Piliaris as a special attorney. In our opinion this authority is conferred by 28 U.S.C. §§ 515(a), 543. See H.R. Rep. No. 2901, 59th Cong., 1st Sess. 1-2 (1906); *cf. Schebergen* v. *United States*, 536 F.2d 674 (6th Cir. 1976); *In re Grand Jury Subpoenas of Persico*, 522 F.2d 41 (2d Cir. 1975).

Nothing precluding such an appointment is found in the Federal Rules of Criminal Procedure. Rule 6(d) of Fed. R. Crim. P. provides that "attorneys for the government" may be present during grand jury sessions. Rule 54(c) defines attorneys for the government as including "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney . . . ." The original Advisory Committee Notes to Rules 6(d) and 54(c) indicate that they are to be read in

conjunction with existing statutes, including 28 U.S.C. § 515 (a) (previously codified at 5 U.S.C. § 310). 18 U.S.C.A. annots. to Rules 6(d) and 54(c); *In re Grand Jury Subpoenas of Persico, supra* at 66; *United States* v. *DiGirlomo*, 393 F. Supp. 997, 1000-01 & n.2 (W.D. Mo.), *aff'd* 520 F.2d 372 (8th Cir.), *cert. denied*, 423 U.S. 1033 (1975). Accordingly, special attorneys appointed pursuant to Sections 515(a) and 543 are authorized assistants of the Attorney General under Rule 54(c), and are therefore attorneys for the Government within the meaning of Rule 6(d). *Little* v. *United States*, 524 F.2d 335, 336 (8th Cir.), *cert. denied*, 424 U.S. 920 (1976).

IV

DISQUALIFICATION OF PILIARIS

The final question is whether Piliaris, on ethical grounds, was disqualified to conduct proceedings before the grand jury as a special attorney for the Government while remaining on the payroll of IRS.

The ABA Standards Relating to the Prosecution Function provide in material part:

> A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties.
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> (Approved Draft 1971, pt. 1, Std. 1.2(a).)
>
> Commentary.
>
> Section 2.3(b) of these standards recommends that the offices of chief prosecutor and his assistants be full-time occupations. The commentary to that subsection points out the potential conflicts of interest which may arise from part-time devotion to the duties of public prosecutor. The instant standard complements section 2.3(b) and at the same time points out situations of likely conflicts of interest. When a conflict of interest may arise the prosecutor should rescuse himself and make appropriate arrangements for the handling of the particular matter by

> other counsel in accordance with the principles of section 2.10, *infra*. It is of the utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of his office.

Canon 9 of the Code of Professional Responsibility provides:

> A lawyer should avoid even the appearance of professional impropriety.

The evidence does not disclose anything actually unlawful on the part of Piliaris in accepting his appointment. The District Court made no findings of any actual conflict of interest. We consider only the appearance of a conflict of interest which, in our opinion, was established by the evidence in this case, and the District Court should have so found. As was stated by Chief Judge Irving R. Kaufman in *General Motors Corp.* v. *City of New York*, 501 F.2d 639, 649 (2d Cir. 1974), in which no actual impropriety was claimed:

> [W]e must act with scrupulous care to avoid any *appearance* of impropriety lest it taint both the public and private segments of the legal profession.

This appearance of impropriety arises by reason of the prior connection of Mr. Piliaris with the investigation by IRS of the income tax returns of GM and the recommendations in which he participated when he was serving as attorney for IRS in Cincinnati. It was Piliaris who, while acting for IRS, wrote the letter to the Department of Justice recommending the grand jury investigation of GM. Piliaris, in that letter, stated that at the appropriate time IRS would request an order from the court authorizing the disclosure of grand jury information to IRS under the provisions of Rule 6(e) of the Fed. R. Crim. P. Shortly prior to his appointment as special attorney Piliaris wrote a memorandum describing an IRS meeting which he attended, at which was planned the conduct of its own handling of the GM matter in coordination with the proposed grand

jury investigation. Some IRS employees were assigned to various aspects of the investigation and IRS would defer GM's request for civil tax ruling pending the grand jury investigation.

It is clear that the Department of Justice attorneys were interested only in the criminal aspects of the case, whereas IRS was interested in the civil aspects and contemplated asking the Court to permit the use of the grand jury material in its civil matters which included GM's 1972 returns and also later returns which have not been audited.

In *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958), Mr. Justice Douglas, who wrote the opinion for the Court, spoke out against "using criminal procedures to elicit evidence in a civil case. If the prosecution were using that device, it would be flouting the policy of the law."

Congress has granted to IRS adequate powers of investigation with respect to civil matters, and it should not be necessary for IRS to conduct a grand jury investigation in order to obtain evidence for its use in civil cases. 28 U.S.C. § 7601, *et seq.*

GM asserts that Piliaris, in conducting the grand jury proceeding, could be interested in obtaining an indictment in order to justify the IRS recommendation to the Department of Justice for a grand jury investigation.

GM also claims that Piliaris might not be interested in investigating GM's charges of misconduct on the part of IRS agents in connection with the audit.

GM further complains about the presence of Piliaris in the secret hearings before the grand jury where it would be possible for him to have access to evidence which IRS could use in civil matters against GM, not only with respect to its tax return for 1972, but also with respect to its returns for subsequent years. Piliaris has been placed in a conflicting and intolerable position.

It should also be remembered that the function of the prosecutor, as was held in *United States* v. *Calandra, supra*, in addition to obtaining an indictment where probable cause

has been shown that a crime has been committed, is also to protect citizens against unfounded criminal prosecution.

In *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962), Mr. Chief Justice Warren, writing the opinion for the Court, described the function of a grand jury with respect to its protection of the rights of citizens, in stronger terms, stating:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

In the present case the worry of GM is that Piliaris has an axe to grind and is more interested in justifying his previous investigations, his recommendations, and the conduct of IRS agents than in protecting GM against unfounded criminal prosecution. It is our duty to determine these important questions now, and not to await review of a possible protracted criminal trial, and not to permit the conduct of grand jury procedures for civil purposes.

In a hearing in the District Court the following exchange took place between the Court and the Government attorney:

> THE COURT: Why can't you take any Internal Revenue Service lawyer and make him a special attorney by appointment and turn the grand jury investigation over to him, let him run the whole show?
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> MR. McBRIDE: Conceivably that could be done.
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> THE COURT: You are saying that would be appropriate?
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> MR. McBRIDE: Yes, your Honor, for this reason —
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> THE COURT: I ought not be concerned with it?
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> MR. McBRIDE: Again for this reason that the law, Section 515 and 543 of Title 28, does not put any limits on the authority of the attorney general. It puts him in control and GM, nor the Court, if I may be forgiven to say so, are not, I think, in a position, and GM should not be able to dictate who it will have conducting this grand jury or to assist in the conduct of this grand jury as it has also been trying to dictate who would be persons to assist the government attorneys and suggesting that we have other people.[4] [A. 261-62]

As we have held, the power of appointment resides in the Attorney General or in his designated assistant. This power of appointment does not authorize the Attorney General, or his associate, to appoint an attorney who has a conflict of interest or an appearance of a conflict, nor does it immunize such an appointment so as to prevent judicial review. The courts have jurisdiction in a proper case to decide whether such conflict or appearance of conflict exists.

In considering the advisability of the appointment of attorneys representing various administrative agencies as special attorneys to conduct grand jury proceedings, the appointing authority in the future might well look into the question of conflict of interest or the appearance of conflict, in order to obviate judicial review.

In *United States* v. *Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977), the District Court was faced with a somewhat similar situation. There, Burton Kolko, the former Chief of the Agreements Division of the Civil Aeronautics Board, and who had become a permanent attorney of the Anti-Trust Division of the Department of Justice, was commissioned as a special attorney to assist in and to conduct a grand jury investigation of an alleged conspiracy by certain airlines to exclude other airlines from doing business in the Southwest,

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[4] It does seem to be anomalous that the attorney for the person being investigated is not permitted to appear before the grand jury and represent his client but is excluded, while here the attorney on the payroll of the Agency instigating the investigation was authorized not only to appear but also to conduct the grand jury proceeding. We do not believe it to be appropriate for either of these attorneys to appear and represent their respective clients before the grand jury.

in violation of the antitrust laws. Certain agreements between the airlines that the Government believed were a part of the alleged conspiracy, had been reviewed by Kolko while he was employed by the CAB. The District Court held that his presence in the grand jury room vitiated the indictment of Braniff. The Court stated, at 583 and 589:

> Although there may have been no intention of wrongdoing, it is indeed strange to find a former high CAB official who had passed upon many of the matters under investigation, to be present in a grand jury room where those very matters are under consideration, irrespective of the capacity in which he presented himself . . . . Whether or not Mr. Kolko was known to the grand jury as a former CAB official cannot be ascertained.
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> Although Mr. Kolko . . . stated he expressed his surprise and chagrin in learning that one or more of the matters which he had passed upon while at the CAB were in fact under investigation by the grand jury, nothing whatever was done to rectify the situation prior to, during, or following Mr. Kolko's appearances in the grand jury room . . . . Neither Mr. Kolko, nor . . . anyone else appears to have recognized any impropriety in placing Mr. Kolko before the grand jury in this proceeding. The courts have expressed a deep concern, and rightly so, that government attorneys be subject to exacting standards which negate conflicts of interest, and more so that their conduct may not suggest even an appearance of impropriety.
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> [*Id.* at 583]

> The Court is further of the opinion and so finds that the employment, assignment, and appearance as an observer or as a prosecutor of Mr. Burton S. Kolko before the grand jury under the circumstances surrounding his former employment as a Civil Aeronautics Board official, constituted him an unauthorized person in the grand jury room during proceedings held in this case, and is an independent ground sufficient to vitiate the indictment.
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> [*Id.* at 589]

In *American Cyanamid Co.* v. *FTC*, 363 F.2d 757, 767 (6th Cir. 1966), this Court disqualified the Chairman of the Federal Trade Commission from hearing a case because of his prior connection with it, and held that his participation in the case deprived the petitioners of due process of law, and invalidated the order under review. Circuit Judge Phillips (now Chief Judge), who wrote the opinion for the Court, stated:

> It is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify. See Prejudice and the Administrative Process, 59 Nw.U.L.Rev. 216, 231 (1964); Disqualification of Administrative Officials for Bias, 13 Vand.L.Rev. 713, 727 (1960).
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> It is to be emphasized that the Commission is a fact-finding body. As Chairman, Mr. Dixon sat with the other members as triers of the facts and joined in making the factual determination upon which the order of the Commission is based. As counsel for the Senate Subcommittee, he had investigated and developed many of these same facts.

Although the agency in the *Cyanamid* case performed quasi-judicial functions, the legal principles are the same.

Other issues are raised by GM which include the conduct by the District Judge of an in camera hearing permitting only counsel for the Government to appear and excluding counsel for GM, *cf. United States* v. *Wind*, 527 F.2d 672 (6th Cir. 1975); and also the entry of an order, copies of which were not furnished to counsel for GM. In view of our disposition of this appeal it is not necessary that we pass upon these issues.

The judgment of the District Court is reversed and the cause is remanded with instructions to terminate the grand jury investigation as invalid, and to enter necessary protective orders relative to the use of the grand jury information.

JUDGE MERRITT, Dissenting. The majority has concluded that this case is now ripe for review and, reaching the merits, that the Attorney General's appointment of an IRS lawyer to conduct a Grand Jury investigation of General Motors in Detroit is unethical under the ABA Code of Professional Responsibility. I disagree with both conclusions.

I. STATEMENT OF THE CASE

In February, 1977, the Department of Justice approved the convening of a special federal grand jury in Detroit to investigate possible criminal tax violations by General Motors. On April 15, 1977, the Attorney General appointed an IRS lawyer to assist Justice Department lawyers in conducting the grand jury inquiry. General Motors moved to disqualify the IRS lawyer from participation in the grand jury proceedings on the grounds that public policy considerations and conflict-of-interest principles of the legal profession prohibit such participation by IRS lawyers who have previously participated in a civil tax investigation of the taxpayer.

Finding that the Attorney General's action is specifically authorized by statute, 28 U.S.C. §§ 515, 543 (1970), the District Judge overruled General Motors' motion to disqualify but certified the issue to us under the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b) (1970) as a "controlling question" – apparently on the ground that, if the District Court's ruling were later found to be erroneous, the presence of an IRS lawyer in the grand jury room might void any indictment returned by the grand jury against General Motors or its officials. General Motors pursued its appeal to this Court under the Interlocutory Appeals Act, and it also appealed under 28 U.S.C. § 1291, treating the order as a "final decision" for purposes of review. General Motors did not file an application for mandamus against the District Judge.

The government then moved to dismiss both appeals, the § 1291 appeal on the grounds that the lower court order

overruling General Motors' motion to disqualify was interlocutory and not final, and the § 1292(b) interlocutory appeal on the grounds that such piecemeal appeals are not allowed in criminal cases. A panel of this Court consisting of Judges Weick, Edwards and Celebrezze entered an order on October 3, 1977, dismissing General Motors' § 1291 appeal but granting General Motors leave to proceed under § 1292(b).[1]

II. THE QUESTION OF APPELLATE JURISDICTION

The District Court's order is not reviewable under the Interlocutory Appeals Act, or as a final decision under § 1291 or on mandamus.

The Interlocutory Appeals Act of 1958 authorizes an appeal of an interim or non-final decision "in a *civil* action" upon a certification by the District Judge that his decision raises a "controlling question of law as to which there is substantial grounds for difference of opinion," the decision of which "may materially advance the ultimate termination of the litigation." The statute in question establishes the right of interlocutory appeal in *civil* cases but it extinguishes that right in *criminal* cases. General Motors' appeal in this case should be characterized as a criminal and not a civil appeal and, therefore, we lack jurisdiction under the Interlocutory Appeals Act.

Cobbledick v. *United States*, 309 U.S. 323 (1940) strongly supports the view that this case is a criminal rather than civil appeal and therefore is not reviewable under the Interlocutory Appeals Act or § 1291. There, the Supreme Court decided that a District Court order overruling a motion to quash a grand jury subpoena was not a final appealable order

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[1] The question arose on the Court's weekly Administrative or Motion Docket and was decided without oral argument or regular conference consideration. We are not bound by the first panel's decision. See *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912); *Petition of United States Steel Corporation*, 474 F.2d 489, 494 (6th Cir. 1973); *Potomac Passengers Association* v. *Chesapeake & Ohio Ry. Co.*, 520 F.2d 91, 95 n. 22 (D.C. Cir. 1975); 1B Moore, *Federal Practice* § 0.404.

under § 1291. Holding that a grand jury proceeding is part of the criminal process, the Supreme Court based its ruling on the historic principle of judicial administration "forbidding piecemeal disposition" and "separate review of the component elements" of criminal cases. The principle is designed to conserve judicial time and prevent delaying tactics in criminal proceedings. Noting that the Fifth Amendment makes the grand jury a necessary part of the criminal process, Justice Frankfurter, writing for the Court, explained that "it is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found."

In *U.S.* v. *Ryan*, 402 U.S. 530 (1971) the Supreme Court recently reaffirmed the holding of *Cobbledick* and the principles on which it is based, observing that non-compliance resulting in a contempt citation is the only way to obtain review of such a grand jury question in advance of indictment and trial:

> [W]e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal. *Id.* at 532-33.

General Motors as the target of the Grand Jury investigation has the same appellate remedies that were available in *Ryan*. It can raise the disqualification of counsel issue after indictment and conviction, the normal course of review in criminal cases, or it can refuse to obey grand jury subpoenas on this ground and appeal a contempt citation. These are the usual remedies, and they are adequate.[2]

[2] Compare the *civil* cases on the subject of interlocutory appellate review of orders denying disqualification of counsel, discussed in a case note in 30 *Vand.L.Rev.* 259 (1977), written by Sara Porter Walsh.

Justice Frankfurter in *Cobbledick* and Justice Brennan in *Ryan* apply these principles of appellate review in order to prevent piecemeal appeals from grand jury activity under § 1291, but the Interlocutory Appeals Act, passed eighteen years after the *Cobbledick* decision, is based on the same set of principles forbidding piecemeal consideration of criminal cases. The Act limits interim review of "a controlling question of law" to *civil* cases only and, therefore, should not be read to allow piecemeal review of grand jury activity.

It is true, as the majority opinion suggests, that the Supreme Court made an exception to the *Cobbledick-Ryan* principle in the *Nixon Tapes* case, characterizing as a "final, appealable order" Judge Sirica's denial of the President's motion to quash the subpoena duces tecum, an order that in other circumstances would not be considered "final" under § 1291. After reaffirming *Cobbledick* and *Ryan*, the Court states the reason for making an exception in that case:

> [T]he traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review.
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> *U.S.* v. *Nixon*, 418 U.S. 683, 691-92 (1974).

The *Nixon* case is, therefore, distinguishable, unless we think that General Motors is in the same position as the President and cannot be investigated by a grand jury without causing a "constitutional confrontation."

Nor should we review this case on mandamus. General Motors has not applied for a writ of mandamus against the

District Judge, and the principles discussed in *Cobbledick* and *Ryan* apply in double measure to the use of the extraordinary remedy of mandamus as a means of piecemeal review in criminal cases. Reasoning that mandamus may only be used in "exceptional circumstances amounting to a judicial usurpation of power," the Court in *United States* v. *Will*, 389 U.S. 90 (1967) rejected the government's mandamus action to compel a district judge to limit pretrial discovery in a criminal case, adding that "this general policy against piecemeal appeals [by mandamus] takes on added weight in criminal cases." *Id.* at 95.

The district judge below has handled General Motors' claim with deliberation, patience and forbearance, in my opinion, and is not guilty of "judicial usurpation."

III. THE CONFLICT-OF-INTEREST QUESTION

The Court holds that the IRS lawyer is disqualified under Canon 9 of the ABA Code of Professional Responsibility after conceding that the Attorney General appointed the lawyer in accordance with specific statutory authority granting him the power to appoint a lawyer to represent the government for a particular case or grand jury investigation. Canon 9 provides that "a lawyer should avoid even the appearance of professional impropriety."

In this case the lawyer has not accepted new employment that either creates a conflict of interest or creates the appearance of a conflict of interest. There is no conflict of interest between the Department of Justice and the Internal Revenue Service. If the lawyer had left General Motors to participate in the grand jury proceedings, General Motors would be entitled to have the lawyer disqualified on grounds of conflict of interest. In tax cases, however, the investigative arm of the government, the IRS, and the litigative arm, the Department of Justice, must exchange information; and they may

also exchange the people in the departments who have the information.

In a civil tax investigation of General Motors, the IRS uncovered information which led it to suspect criminal tax fraud. It gave the information to the Justice Department which initiated a grand jury investigation and deputized an IRS lawyer familiar with the facts so that he could participate in the grand jury investigation – a natural, not a sinister, sequence of events.

Here the majority seems to have confused the demands of the canons of ethics of lawyers with the code of conduct of judges. In its opinion, the majority relies upon two cases, *American Cyanamid Co.* v. *FTC*, 363 F.2d 757 (6th Cir. 1966), and *United States* v. *Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977). In *American Cyanamid* this Court on due process grounds overturned a decision of the FTC because one of the judges participating in the decision had conducted a legislative investigation of the same facts while serving as chief counsel of a Senate Subcommittee. We must recognize, however, that while litigants are entitled to an impartial tribunal, as in that case, they may not demand a neutral prosecutor, as in this case. A judge should disqualify himself from a case he participated in as a lawyer, but a prosecutor need not disqualify himself because he has previously conducted other investigations of the same suspect, whether for the same or a different governmental agency. The court in this case conflates these two separate principles which draw a distinction between judges and prosecutors; but the court is not alone in its confusion, for in the other case cited, the *Braniff Airways* case, the district judge there made the same mistake when he barred a Justice Department anti-trust lawyer, formerly employed by the Civil Aeronautics Board, from conducting a grand jury investigation of alleged anti-trust violations by *Braniff*.

IV. CONCLUSION

In light of the above discussion, I would conclude that neither appellate jurisdiction nor a conflict of interest exists in this case. In addition, both conclusions are strongly supported by the most recent amendment to Rule 6(e) of the Federal Rules of Criminal Procedure[3] governing the use of evidence developed by a grand jury. The stated reasons for the amendment neatly tie together both of the issues presented by this case and prove to me that Congress did not think that this situation creates a conflict of interest or that the proceedings of the grand jury should be interrupted by interlocutory appeals.

1. *Exchange of Grand Jury Information.* Under the new Rule 6(e), most grand jury proceedings may be disclosed to "an attorney for the government" or "to such governmental personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law." Under the old rule, disclosure could be made *only* to "attorneys for the government," but not to other "government personnel."

The Senate Report on the proposed amendment states that the purpose of the change is to facilitate the kind of intra-government cooperation which occurred in this case and to enable federal prosecutors in grand jury proceedings to benefit from the expertise of agents from other departments and agencies of government:

> Attorneys for the Government in the performance of their duties with a grand jury must possess the authority to utilize the services of other government employees. Federal crimes are "investigated" by the FBI, by *the IRS*, or by Treasury agents and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries. Often the prosecutors need the assistance of the agents in evaluating evidence. Also, if further investigation is required during or after grand jury proceedings, or even during the course of criminal trials, the Federal agents must do it. *There is no reason for a barrier of secrecy to exist between the facets of the criminal justice system upon which we all depend to enforce the criminal laws.* Sen. Rep. No. 95-354, 95th Cong., 1st Sess., July 20, 1977, *reprinted in* U.S. Code Cong. & Admin. News Vol. 7A (Aug. 1977), p. 1480 (emphasis added).

[3] P.L. 95-78, 95th Cong., 1st Sess., 91 Stat. 391 (1977).

The Senate Report goes on to say that there is "no intent to preclude the use of grand-jury developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of criminal investigation." *Id.* at 1482. There is no showing in this case, and no finding by the Court below, that the government is using the grand jury for impermissible purposes or that the exchange of information or employees between the IRS and the Justice Department is improper.

2. *Interlocutory Review of Grand Jury Proceedings.* The old Rule 6(e), according to the Senate Report, had created a "state of uncertainty" and was "spawning some judicial decisions highly restrictive of the use of government experts" and other decisions "that make Rule 6(e) orders subject to interlocutory appeal." *Id.* at 1480. The Report suggests that such appeals should not be allowed for the reasons given by Justice Frankfurter in the *Cobbledick* decision and quotes the following language from that opinion: "It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found." 309 U.S. at 327.

Thus, in amending Rule 6(e), Congress has once again adhered to the historic principle disallowing piecemeal review of criminal cases, just as it did when it passed the Interlocutory Appeals Act of 1958.

Appendix D

United States District Court

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

In re:

April, 1977 Grand Jury Subpoenas
(General Motors Corporation)
(William A. Schumacher)

Misc. No. 77-144

OPINION OF THE COURT on Motion to Quash Subpoenas in the above-entitled matter before Honorable James P. Churchill, United States District Judge, at Detroit, Michigan on Tuesday, June 28, 1977.

PHILIP VAN DAM, United States Attorney
WILLARD C. MCBRIDE, Special Assistant Attorney
Department of Justice
ROBERT E. FORREST, Assistant United States Attorney,
Tax Division
MENO W. PILIARIS, Special Assistant United States
Attorney

Appearing on behalf of the United States.

JONES, DAY, REAVIS & POGUE,
(1700 Union Commerce Building, Cleveland, Ohio)
GEORGE J. MOSCARINO, Esq.
HUGH CALKINS, Esq.
WALLACE M. WRIGHT, Esq.
JULIUS L. RUSSU, Esq., Senior Attorney
General Motors Corporation

Appearing on behalf of General Motors Corp.

GARY POLLACK, Esq.

Appearing on behalf of Mr. Schumacher.

Detroit, Michigan
Tuesday, June 28, 1977
2:00 P. M.

THE COURT: I would have much preferred to have prepared and filed a written opinion but I know that it wouldn't have been done yet. By giving the Court's opinon orally I am doing two things, it enables me not to spend a lot of time on citations and the like because I know that you gentlemen, whatever you do with this will be able to handle that aspect of it very nicely without the citations.

Secondly, it puts a deadline or time limit which doesn't change the result it just perhaps brings the result on a little bit quicker.

In any event—when a lawyer receives the judge's opinion in the mail the lawyer typically reads the last paragraph first and then digests the opinion as to why the judge was right or wrong, as the case may be. In a moment I will figuratively read the last paragraph then explain the reasons for it. First, however, there are some comments on the nature of the proceedings that seem appropriate.

To put it mildly the government has argued that it has been inappropriate for General Motors to call upon the Court for protection in this situation. In my view the motions in this case raise several issues worthy of scrutiny not only in this court but eventually in this or in other cases, certainly in higher tribunals as well.

The potential for abuse of federal grand jury process by federal prosecutors is enormous. There are three sources of protection against such abuse. Foremost, theoretically, are the citizens of the grand jury themselves. Foremost, in practice, are the attorneys for the government exercising self-restraint and guided by good conscience.

The last line of defense against grand jury abuse is the federal judiciary with the ultimate authority to do

whatever is necessary. One other generalization seems appropriate. If indeed the good conscience and self restraint of the government prosecutors is in fact the main line of defense against abuse of the grand jury process, and I don't know any prosecutor that will deny it, then the more willingly the decision-making process is surrendered or shared with others the less protective will be their self restraint.

In these proceedings General Motors challenges the validity of a concept identified as the open ended grand jury investigation. The General Motors approach has been to examine the process as a whole, point out its defects and then condemn it generally, conceding that General Motors and others similarly situated are not beyond the grand jury investigation if properly conceived and conducted.

The government responds that the procedure being followed is proper and correct in all respects and asks the Court to deny all requested relief.

Now for the bottom line. For reasons which will be explained in detail the Court will deny the motion to quash the subpoenas but it will grant the motion in part for a protective order. Specifically the Court determines that attorneys for the government may not disclose matters occurring before the grand jury to agency personnel except for technical assistance and then only as specifically authorized by the Court.

The government must establish the necessity for assistance of each individual involved and that showing may be by ex parte petition. The order of authorization if granted will be an ex parte order. Prior involvement in the criminal or civil investigation will not bar an individual from access to grand jury evidence if there is sufficient showing of necessity. The order will prohibit the disclosure of grand jury evidence or summaries thereof to top level Internal Revenue Service personnel for recommendation with respect to indictment.

Finally, the motion to deny Attorney Piliaris access to the grand jury as an attorney for the government will be denied.

I will now turn to the reason for these rulings:

General Motors' motion to quash the grand jury subpoena is in effect a motion to block the grand jury investigation. General Motors complains about Internal Revenue Service involvement in four stages of the grand jury procedure.

The first stage involves the decision to conduct a grand jury investigation and the planning therefor.

The second stage is the evidence-gathering state.

The third stage involves analysis of the evidence and a decision as to what indictments, if any, to seek.

The final stage involves the dissemination of grand jury evidence for agency use.

In connection with the first stage, that is the decision to conduct a grand jury investigation and the planning which has gone into it. We are looking at what has occurred. If something illegal or fundamentally unfair has occurred which necessarily taints the remaining procedure then an appropriate remedy may be to quash the subpoenas. If nothing illegal or fundamentally wrong has occurred up to this time, but if it appears something illegal or improper is likely to occur in connection with subsequent proceedings, then the appropriate remedy is to fashion a protective order to fit the circumstances rather than to quash the subpoena.

The Justice Department may then decide to proceed within the framework of the Court's protective order or seek appellate relief therefrom or perhaps both. The Court can find no legal, technical reasons why the grand jury should be prohibited from proceeding.

General Motors complains that IRS personnel have acted rudely and in concert to create an appearance that ordinary IRS statutory investigative procedures will not

be effective and that a grand jury investigation is necessary. Perhaps this allegation is true but if it is true it is not controlling. There are no applicable exhaustion of remedies requirements. There are no legal conditions precedent to a grand jury investigation. The decision to ask a grand jury to investigate possible violations of federal criminal statutes is an executive decision; it's an executive prerogative pure and simple.

Apart from technical considerations [and] precedent are there any reasons founded on fundamental fairness why the Court should in this instance intervene and stop the investigation? General Motors complains about the obviously heavy Internal Revenue Service input into the planning stages of the investigation. This in no way violates the principal of grand jury secrecy and grand jury independence.

Rule 6(e) of the Federal Rules of Criminal Procedure embodies the viable law concerning grand jury secrecy. The secrecy rule applies only with respect to matters which occur before the grand jury. Grand jury independence means independence of inquiry and independence of action.

No amount of communication, advice, or recommendation flowing from agency personnel to attorneys for the government or even in the other direction prior to convening of a grand jury could possibly violate the principles of grand jury secrecy or independence. There is nothing fundamentally wrong or evil with the Justice Department attorneys seeking advice from an Internal Revenue Service personnel with respect to what to look for, whom to subpoena, what documents to subpoena, what questions to ask and the like.

There isn't even a legal reason why such communications should not continue after the grand jury is convened but there is a substantial risk of inadvertent or intentional disclosure of matters occurring before the grand jury in

such case and there is the very real risk of the appearance of impropriety.

Are there any other reasons why the Court should not allow its process to be used? The Court's authority and responsibility to prevent the awesome power of the grand jury investigation from being abused is well established and the Court is not limited by any previously established definitions of grand jury abuse.

If some new scheme of abuse of grand jury investigative power evolves the Court must develop appropriate responses.

It was something like pulling teeth but in response to the Court's questions during oral arguments the government did virtually concede that it would be an abuse of grand jury process to conduct a grand jury investigation under the guise of a criminal investigation when the sole or even primary purpose thereof was to gather evidence for civil purposes.

I express absolutely no opinion with respect to the merits of possible criminal charges against General Motors and others. The record before the Court, however, is sufficient to support the government's claim that one good faith purpose of grand jury proceedings will be to investigate possible criminal acts.

Even the affidavit of Mr. John Olsewski, and I'm sure I didn't pronounce the name correctly, it's spelled O-l-s-e-w-s-k-i, filed by General Motors supports this conclusion. Paragraph 11 of his affidavit he said, and I quote:

> "Finally, my review of the grand jury subpoena indicates to me that they were intended to provide the government with a base of information and data for use in the determination of the criminal tax issues and ultimately the civil liabilities of General Motors."

By the nature of the case most of the evidence that will be relevant in a criminal investigation may, depending upon the ultimate resolution of complex issues of income tax law, be relevant to civil tax liability determination as well.

If the grand jury investigation produces evidence of criminal violation it's not unlikely that the same evidence would be a treasure trove of valuable tax data. The evidence is convincing that the Internal Revenue Service has already concluded that it will eventually seek to obtain grand jury evidence for use in connection with civil tax liability determination unless by the time it may be available the tax liability issues have been resolved.

The record is replete with evidence from which this might be inferred but it is not necessary to rely on the inference. In a letter dated December 23, 1976 from Gerald Fuller, Assistant Regional Counsel to Myron C. Baum, Acting Assistant Attorney General, Tax Division, Department of Justice, setting forth the formal request for an open ended grand jury investigation, Mr. Fuller says, and I am quoting directly from the letter:

> "At the appropriate time we will —"

I'll start over.

> "At the appropriate time we will request that an order be sought from the Court authorizing the disclosure of grand jury information to IRS under the provisions of Rule 6(e) of the Federal Rules of Criminal Procedure."

During oral argument Mr. McBride, speaking for the government suggested this was standard or form language that should perhaps be changed. If it is standard or form language it is also standard or form intent. Changing the language may change the evidence in some future case but it won't necessarily change the intent.

Distinguishing for a moment between intention and motivation, it is interesting, but ultimately fruitless to speculate upon the extent of the IRS and Justice Department dual motivation for seeking and agreeing to a grand jury investigation. Whatever the motivations there is no

evidence that the Justice Department in this case plans or intends to use the grand jury subpoenas to gather evidence not relating to its criminal investigation.

If in fact it did so and it became known this would provide General Motors with a powerful argument why the Court ought not to authorize the use of any evidence for agency purposes when the criminal proceedings, if any, are complete.

In the final analysis General Motors and its employees and others similarly situated have no immunity from investigation. To quash the grand jury subpoenas because of government, because government people envision civil benefit from a criminal investigation would amount to a grant of such immunity. For these reasons the motion to quash the grand jury subpoenas will be denied.

Now this brings us to issues involving protective orders or supervisory control over the disclosure of grand jury evidence during the evidence-gathering stage.

Rule 6(e) by its language provides for disclosure of matters occurring before the grand jury only to jurors, interpreters, stenographers, operators of recording devices, typists and attorneys for the government for use in the performance of their duties. There is no direct authorization for disclosure of grand jury evidence by attorneys for the government to police or agency personnel.

There is ample precedent in the case law for this to be done and there is nothing gained from extended discussion. The clear reason the courts have permitted disclosure by attorneys for the government to police and agency personnel is the necessity for such disclosure if a grand jury investigation is to proceed in an effective manner. The trend of decision is too well established for a district court to resist, notwithstanding that the Sixth Circuit precedent therefor is very sketchy.

One aspect of any kind of such disclosure troubles me. There is much dicta that persons such as police and agency

personnel, who received grand jury evidence from attorneys for the government are subject to contempt if they make unauthorized disclosures, but there is no real authority to support the dicta. Notwithstanding this problem, it is my opinion that attorneys for the government may disclose grand jury evidence to police agencies and administrative agency personnel as well.

Who determines necessity — the attorneys for the government or the court? The government takes the position that they are under no compulsion to seek court approval. If ever there was a type of case that should require prior court approval it is such as [sic] case as this.

In my opinion Judge Becker was correct when, in the Hawthorne case — I won't bother with the citation here the lawyers know what the Hawthorne case is, at page 1126, he said, and I quote relevant language therefrom:

> "We believe that 6(e) orders should be applied for whenever the technical assistance of the IRS or a similarly situated agency outside of the Justice Department, such as the Securities Exchange Commission, is to be utilized in connection with a grand jury investigation, with the exception of cases where the assistance is of minor proportions or the single instance variety, such as, utilization of Postal Service or Secret Service expertise in obtaining and evaluating handwriting exemplars or other identification material.
>
> "Moreover, we do not impart to 'technical assistance' a meaning which would subsume routine investigation by an FBI agent, for example, in support of a grand jury investigation. The classical case for the application of 6(e) orders is the IRS or SEC case, or in some instances the Postal Service, Customs, or Secret Service case, where the agency has continuing regulatory or oversight responsibility with respect to the activities of an individual or corporation, and the use and retention of grand jury material beyond the aegis of the U. S. Attorney would breach the secrecy

of the grand jury and pervert the grand jury process."

I just simply agree with Judge Becker in that respect.

The United States District Court for the Eastern District of Pennsylvania and the Court of Appeals for the Ninth Circuit have wrested with the same problems, producing inconsistent decisions. I won't cite the cases now the lawyers are well acquainted with them. If there is a discernible trend in these decisions it is this: The courts are backing off from the original free hand to the government and are requiring particularized prior approval by the court in appropriate cases.

In this case a protective order will enter prohibiting disclosure of grand jury evidence by attorneys for the government to Internal Revenue Service personnel except as authorized by the Court. Such an order may be obtained, if at all, in a non-adversary, ex parte proceedings. The disclosure will be authorized only as shown to be necessary on a person-to-person basis. The disclosure will be for technical assistance only. Technical assistance does not include advice of agency personnel as to what indictments, if any, to seek.

Because the Court's order will be ex parte, General Motors is not entitled to be informed of the names of the persons, if any, to whom disclosure will be authorized. It is the Court's determination that prior involvement in a criminal and/or civil investigation does not disqualify the agency personnel from participation as technical assistants.

In this particular case, the in camera disclosure made by the government to the Court in practical effect gives the Court sufficient information upon which to make a decision. As a matter of principle, however, it is, in my view, more appropriate that a petition for such an order be sworn to by one or more of the attorneys for the government. In this case, the government may either submit

a sworn petition summarizing the need for disclosure to agency personnel or, if the government deems appropriate, file a generalized affidavit adopting as true the unsworn disclosures already made to the Court on the record.

In either event the government should prepare for the Court's consideration, a proposed form of order specifying the individuals who they believe should be designated on an authorization for approval, rejection or modification by the Court.

A sub-issue has been suggested. There is some case authority that suggests this: Should the technical assistants be sworn as witnesses? Should they be required to take some form of special oath before the Court? I don't think it means anything for them to be grand jury witnesses unless they testify. The rule of grand jury secrecy does not apply to witnesses. The Court will not participate in any special oath-giving ceremony as has been suggested because Rule 6(e) contains the following unambiguous language, and I am quoting:

> "No obligation of secrecy may be imposed upon any person except in accordance with this rule."

I don't have it written down but to bring a witness in here, frankly, I believe would be a violation of that rule.

Let's turn our attention to the third stage of proposed IRS involvement in the grand jury investigation. By way of repetition this stage involves analysis of the evidence and the decision as to what indictment, if any, to seek. It is apparently basic to the government's concept of an open ended grand jury that selected agency, that is IRS, personnel working with attorneys for the government--correction—that agency personnel working with attorneys for the government summarize the evidence, which summaries are then used to seek the advice of high-level IRS personnel as to what indictments, if any, to ask the grand jury to return.

At some prior stage of the proceedings in this court I have expressed real concern about the authority for such a step because it would constitute a disclosure, in summary form, of matters occurring before the grand jury. Apparently as a direct result of my expressed concern the government has furnished to the Court the following letters:

This is a letter direct to me from the Department of Justice signed by Mr. Baum, the Acting Assistant Attorney General dated June 20, a copy of this was furnished to General Motors. Well, it's just a transmittal letter. I won't read the whole detail of it because it doesn't mean anything to the group here generally and General Motors already has a copy of the letter but it is a transmittal letter explaining to me that another letter of some substance is in effect.

This other letter is written under the name of Myron C. Baum, Acting Assistant Attorney General of the Tax Division and it's to an Honorable Leon G. Wigrizer, Acting Chief Counsel of the Internal Revenue Service in Washington and refers to General Motors in Detroit. This is the substance of the letter:

> "This refers to our letter dated April 1, relative to the conditions under which grand jury material would be disclosed to the Internal Revenue Service in this matter. This further refers to a meeting of this date between certain Tax Division, Department of Justice personnel and several Internal Revenue Service officials in which a further discussion was had with respect to the examination of grand jury material in the above matter."

Then there is some reference to paragraphs in the previous letter and a certain paragraph has been replaced with the following items:

> "No disclosure of grand jury material will be made to Internal Revenue Service personnel for other than for criminal purposes and then only to those personnel specifically identified by name and the office to which he or she is assigned, such disclosure to be for the purpose of assisting government attorneys in their duties or in assisting the Department of Justice in arriving at a final decision as to whether or not to seek an indictment.
>
> "Two attorneys from the Regional Counsel's office, to be identified, will be permitted to examine grand jury material at or near the conclusion of the grand jury investigation. Such attorneys will then submit their views or recommendations to the Tax Division, Department of Justice, favorable or unfavorable, which will be in addition to a report the Department of Justice attorneys and the United States Attorney's office will submit to the Tax Division. Upon receiving these reports and recommendations, the Department of Justice will, after review, make a final determination as to whether or not to seek an indictment.
>
> "All Internal Revenue Service personnel, including the two Regional Counsel attorneys, will be brought before a federal judge in open court and take an appropriate oath to keep grand jury information inviolate.
>
> "The review of grand jury material by the Regional Counsel attorneys will be conducted in Detroit under the aegis of the attorneys for the government. The report of the Regional Counsel attorneys, together with all copies and workpapers, will be submitted to the Tax Division, Department of Justice. No copies of the report will go to anyone in Internal Revenue Service except for those IRS personnel so identified. No grand jury information will be made available to Internal Revenue Service without authority of the Court."

and then it's signed.

I respectfully suggest that the security arrangements on that are very good and I am not concerned at all that

there would be an unauthorized further disclosure to other IRS people under those security arrangements.

However, getting back to what I have written here: There are apparently well-established traditions that the Justice Department undertake no criminal prosecutions for violation of income tax related laws without the advice and recommendation or perhaps even approval of the Internal Revenue Service, and there are apparently policy reasons for this.

There are non-technical or discretionary reasons and there are legal or technical reasons why this procedure can not be approved if disclosure of grand jury evidence is involved. The non-technical or discretionary reasons may be summarized as follows:

The danger is real that Internal Revenue Service people will be influenced by civil considerations. Prohibiting this type of disclosure appears to be one way of restricting a potentially mushrooming growth of the so-called open-ended grand jury investigation in IRS cases with all its inherent dangers and potential for abuse, without restricting the government's ability to detect and prosecute crime.

That is a subjective thing and it's my view, and it's not controlling in any event because if such disclosure from a policy point of view were totally desirable it is clearly not authorized by Rule 6(e) and the incorporated applicable definition of attorneys for the government. The courts have based an exception to the language of the rule in the technical assistance situation. This exception—I already discussed that in some detail—this exception, as previously pointed out, is based on necessity.

Here there is no necessity. Policy is not the equivalent of necessity. Justice Department attorneys, U. S. Attorneys and their assistants, are able to make the critical decision as to whether to seek criminal indictments with respect to

every other imaginable situation. It's unclear why they would need IRS input in this situation.

It is for these reasons that this Court will not contribute to the creation of a new exception to the rules and principles of grand jury secrecy and independence as the government, in effect, is asking it to do. The protective order to be issued will prohibit this type of disclosure. Fortunately, the government will have time to seek appellate review of the Court's decision in this respect before it becomes critical because the grand jury investigation, if they elect to investigate under the other conditions imposed by the Court and they are certainly unduly restrictive, can proceed.

The final stage of IRS involvement in the grand jury proceeding involves ultimate disclosure for civil purposes. The Court is not called upon to make any decision in this respect at this time. I will comment, however, that the attorneys for the government and Internal Revenue Service have apparently taken all reasonable steps to avoid breach of grand jury secrecy and security and the disclosure of grand jury evidence to Internal Revenue Service personnel except as specifically authorized by the Court.

There will be a lot of people involved if this thing goes forward and a lot of IRS people and I don't for a moment suggest security will ever be perfect. I am commenting off the written record but the track record in this country and perhaps in this community for grand jury secrecy hasn't been very good but in this case the attorneys for the government have recognized that and have planned for it and I can't fault their efforts if they go forward with the plans to maintain security and secrecy. The breaches they laid right out and said, "This is what we intend to do" and those are the things I am trying to control in the order.

I have saved for final treatment the Piliaris issue because it is, in my view, perhaps the most difficult of all. General Motors has no more right to select its adversary's counsel than does the government, and there is nothing fundamentally wrong or illegal about the assignment of personnel, including attorneys, between departments. It would be a violation of Rule 6(e) for the government to have attorneys other than attorneys for the government, as that term is defined in Rule 43(c) within the grand jury room.

If Mr. Piliaris is in the grand jury room as the eyes, ears, and voice of the Internal Revenue Service, then the rule would be violated. If this is subsequently established, it may taint the entire grand jury process, invalidate any indictments that are returned, and destroy any expectation of obtaining a later 6(e) order for use of evidence for civil purposes. If he is in the jury room functioning solely as an attorney for the government, relying only on this experience with the IRS, I can see nothing wrong with his participation.

The government has been pointedly warned about using grand jury, about using the grand jury to gather evidence not relevant to crime, and perhaps his experience in this respect will be useful to the government.

The Court will deny the General Motors motion with respect to him, and the government may proceed at its own risk.

Now there is before the Court for consideration a motion to quash a subpoena directed to Mr. William A. Schumacher. I read the briefs and heard the very careful arguments that were presented in that matter yesterday. I don't think that there is anything else need to be said. The order in that respect, the protective order that I am making in the General Motors case will have for all practical purposes such protection with respect to Mr.

Schumacher or any other witnesses as may be appropriate and there is no apparent need, certainly I am not going to quash the subpoena, so the motion of Mr. Schumacher is denied for the reasons set forth and, that's it, gentlemen.

MR. VAN DAM: Thank you, your Honor.

Appendix E

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re APRIL 1977 GRAND JURY SUBPOENAS	Misc. No. 77-144

MEMORANDUM OPINION

The motion of General Motors Corporation to amend certain orders entered June 30, 1977, the briefs in support thereof, and the government's opposition brief have been carefully considered.

It is the opinion of the Court that a recent amendment to Rule 6(e) of the Federal Rules of Criminal Procedure has effectively caused to be moot as controlling questions of law as to which there is a substantial ground for difference of opinion the Court's PROTECTIVE ORDER and the Court's ORDER DENYING MOTION TO QUASH SUBPOENAS.

It does not appear that such amendment affects who may be present in the grand jury room. It is the Court's opinion that the ORDER DENYING MOTION FOR PROTECTIVE ORDER RE MENO W. PILIARIS does involve a controlling question of law as to which there is substantial ground for difference of opinion.

If it is ultimately determined that it is improper for Meno W. Piliaris to be present while the grand jury is in session, then there will be a very substantial waste of time and resources by General Motors Corporation, the government, and grand jurors themselves.

For the foregoing reasons, an order will be entered amending the order entered June 30, 1977, originally entitled ORDER DENYING MOTION FOR PROTECTIVE ORDER RE MENO W. PILIARIS, as prayed; and an order will be made denying the motion to amend the other two orders referred to in General Motors' motion.

/s/ JAMES P. CHURCHILL
JAMES P. CHURCHILL
United States District Judge

A TRUE COPY
HENRY R. HANSSEN, Clerk

By LILLIAN BROOKS
Deputy Clerk

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re APRIL 1977	}	**Misc. No.**
GRAND JURY SUBPOENAS	}	**77-144**

AMENDED ORDER DENYING MOTION FOR PROTECTIVE ORDER RE MENO W. PILIARIS

At a session of said court held in the Federal Building and U. S. Courthouse, Detroit, Michigan, on August 23, 1977.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

For reasons set forth on the record in open court on June 28, 1977, and for reasons set forth in a Memorandum Opinion bearing this date;

IT IS ORDERED that the motion for protective order concerning participation in the grand jury process by Meno W. Piliaris is DENIED.

The undersigned is of the opinion that this order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from this order as authorized by 28 U.S.C. § 1292(b) may materially advance the ultimate termination of this litigation.

/s/ JAMES P. CHURCHILL
JAMES P. CHURCHILL
United States District Judge

A TRUE COPY
HENRY R. HANSSEN, Clerk

By LILLIAN BROOKS
Deputy Clerk

Appendix F

Nos. 77-1508 and 77-8108

United States Court of Appeals
FOR THE SIXTH CIRCUIT

FILED

OCT. 3, 1977

JOHN P. HEHMAN, Clerk

GENERAL MOTORS CORPORATION,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

IN RE APRIL 1977 GRAND JURY PROCEEDINGS.
GENERAL MOTORS CORPORATION,
Petitioner

ORDER

Before WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

The appellee has moved to dismiss the appeal in case No. 77-1508 on the ground that the orders from which an appeal is sought are not appealable.

General Motors Corporation has petitioned this Court for permission to appeal under 28 U.S.C. § 1292(b) upon the certification of the District Court in case No. 77-8108.

Upon consideration, it is ORDERED that the motion to dismiss the appeal be granted and the appeal in No. 77-1508 is hereby dismissed.

The petition for leave to appeal in No. 77-8108 is hereby granted, and the appeal is advanced for hearing to the December 1977 term of this Court.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Appendix G

Office of the Attorney General

Washington, D.C. 20530

FILED
U. S. DISTRICT COURT
EASTERN MICH.
Apr. 18 1:24 PM '77
HENRY R. HANSEN
CLERK

April 15, 1977

Meno W. Piliaris, Esquire
Office of Regional Counsel
Internal Revenue Service
Central Region
P. O. Box 2059
Cincinnati, Ohio 45201

Re: General Motors Corporation
Detroit, Michigan

Dear Mr. Piliaris:

As an attorney for the Government employed full time by Chief Counsel, Internal Revenue Service, and designated as a Special Attorney under the authority and direction of the Department of Justice, you are hereby authorized and directed to file informations and to conduct in the Eastern District of Michigan and in any other judicial district any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before United States Magistrates, which United States Attorneys are authorized to conduct.

You may file a copy of this letter with the Clerk of the District Court to evidence this authorization.

Sincerely,

/s/ PHILIP H. MODLIN
Philip H. Modlin
Acting Attorney
General Attorney

Supreme Court, U. S.
FILED
DEC 8 1978
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-739

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL MEMORANDUM OF PETITIONER

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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-739

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL MEMORANDUM OF PETITIONER

This Supplemental Memorandum is submitted to bring to the Court's attention two recent decisions of the United States Courts of Appeals for the First and Seventh Circuits published subsequent to the filing of the Petition in this case. These decisions make clear the conflicts which exist

among the courts of appeals as to both of the procedural issues presented in GM's Petition.[1]

I. THE SEVENTH CIRCUIT DECISION CONFLICTS WITH THE SIXTH CIRCUIT'S DECISION IN THIS CASE BOTH AS TO APPEALABILITY UNDER § 1291 AND AS TO WHETHER A GRAND JURY IS A CIVIL OR A CRIMINAL PROCEEDING.

The Seventh Circuit's decision in *In re Special February 1977 Grand Jury*, 581 F.2d 1262 (7th Cir. 1978) (reprinted as Appendix I hereto), conflicts with the decision of the Sixth Circuit in this case as to the jurisdiction of the federal appellate courts.

One issue stated in GM's Petition is "whether an order denying a motion to disqualify counsel in a grand jury proceeding may be appealed under 28 U.S.C. § 1291." The Sixth Circuit majority held that such an order cannot be appealed pursuant to § 1291. The Seventh Circuit ruled to the contrary:

> We conclude therefore that the denial of a disqualification motion in a grand jury setting falls within the "collateral order" exception of *Cohen*, and that the Government has standing to appeal such a denial. [App. I-4; 581 F.2d at 1264].

The Sixth Circuit majority below reasoned that the disqualification issue can be raised after conviction and "is not an issue which is 'destroyed' if not 'vindicated before trial.'" [GM Cert. Pet. at B-7]. The Seventh Circuit disagreed, stating that "such a denial must be viewed as a final order that implicates important rights which would be irretrievably lost if review were denied." [App. I-3; 581 F.2d at 1264].

The government argued conflicting positions in these two cases: it claimed in the Seventh Circuit that orders denying disqualification in a grand jury setting are appealable,[2] while it argued the opposite position in the Sixth Circuit. There is no way to reconcile these two cases except on the basis that the government always wins.

The government's appeal in the Seventh Circuit is also inconsistent with its position in the Sixth Circuit, adopted by the majority of that Court, that a grand jury is a criminal proceeding for the purpose of § 1292(b). The government's brief in the Seventh Circuit argued that the decision denying its motion to disqualify "is not one which will merge in a final judgment, as there is no criminal action pending before the District Court."[3] The Seventh Circuit adopted this language in its opinion. [App. I-3]. Furthermore, by taking appeals to the Seventh and

[1] A decision of the Seventh Circuit on October 4, 1978 describes the substantive issue presented in GM's Petition as "an issue of considerable importance to the administration of criminal justice" which "has not yet been conclusively resolved." *In re Perlin*, ... F.2d ..... (7th Cir. 1978), slip op. p. 2. Similarly, a recent District Court decision states that "*GM* presents, in sharp relief, a conflict between two competing principles fundamental to our notion of criminal justice." *United States v. Dondich*, [1978] FED. SEC. L. REP. (CCH) ¶ 96,547 (C.D. Cal. 1978).

[2] The government also recently appealed from an order denying a motion to disqualify an attorney in a grand jury proceeding in *In re Grand Jury Investigation, Appeal of United States*, 576 F.2d 1071 (3d Cir. 1978) (*en banc*), *cert. denied*, 47 U.S.L.W. 3310 (U.S., Nov. 7, 1978), and asserted to the Third Circuit that "[T]his Court has jurisdiction over this appeal under 28 United States Code Section 1291" (Brief for Appellant at 1). However, since the district court had held that the government's motion was not yet ripe for judicial intervention, 436 F. Supp. 823, the Third Circuit apparently dismissed the government's appeal for lack of finality, although accepting an appeal by one of the grand jury witnesses whose counsel had been disqualified by the same order.

[3] Brief for the United States at 18. The relevant portion of the government's brief in the Seventh Circuit is reprinted herein as Appendix II. The quoted language appears at App. II-4.

Third[4] Circuits under § 1291, the government concedes that a grand jury investigation is not a "criminal proceeding" for the purpose of applying appellate jurisdiction statutes. The government can only appeal from an order in a "criminal proceeding" pursuant to 18 U.S.C. § 3731. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977); *United States v. Wilson*, 420 U.S. 332, 336 (1975); *Will v. United States*, 389 U.S. 90, 96 (1967); *United States v. Sanges*, 144 U.S. 310, 319 (1892). Section 3731 allows the government to appeal from "a decision or order of a district courts [sic] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding. . ." Since the government can obtain appellate review of orders in grand jury proceedings not involving suppression of evidence or return of seized property, the government must admit that a grand jury investigation is not a "criminal proceeding" for the purpose of applying the language of the appellate review statutes.

From this simple analysis it is clear that both the government and the Seventh Circuit treated the appeal as a civil matter, while in the present case both the government and the Sixth Circuit treated it as a criminal proceeding.

II. THE FIRST CIRCUIT DECISION HOLDING THAT ORDERS DISQUALIFYING COUNSEL IN GRAND JURY PROCEEDINGS ARE NOT APPEALABLE UNDER § 1291 CONFLICTS WITH DECISIONS OF THREE OTHER CIRCUITS THAT SUCH ORDERS ARE APPEALABLE.

In arguing that orders denying disqualification of counsel in a grand jury proceeding are appealable, GM has relied extensively on the decisions of the Third, Fourth,

[4] *See* note 2, *supra.*

and D.C. Circuits holding that orders disqualifying counsel in a grand jury proceeding are appealable under § 1291. *In re Investigation Before February, 1977, Lynchburg Grand Jury*, 563 F.2d 652 (4th Cir. 1977), *Matter of Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009 (3d Cir. 1976); *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976). Two other circuits have also decided such appeals without even questioning their appellate jurisdiction. *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977); *In re Gopman*, 531 F.2d 262 (5th Cir. 1976).

In spite of this wealth of authority from five circuits, the First Circuit recently dismissed *sua sponte* an appeal from an order disqualifying counsel in a grand jury proceeding in *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978). The First Circuit specifically disapproved the decisions of the Third, Fourth and D.C. Circuits and held that, notwithstanding the settled law on the appealability of orders respecting disqualification motions, the decisions of this Court in *Cobbledick v. United States*, 309 U.S. 323 (1940), and *United States v. Ryan*, 402 U.S. 530 (1971), bar appeals of *any* orders in grand jury proceedings.

It should be noted that the government did not contest the First Circuit's jurisdiction in *Benjamin*, a failure which is inconsistent with the government's challenge to the Sixth Circuit's jurisdiction in this case.

CONCLUSION

The circuits are in hopeless disagreement as to their jurisdiction to hear appeals from orders respecting motions to disqualifying counsel in a grand jury setting, and this Court should resolve this jurisdictional conflict in view of the accelerating activity in the circuits on this question.

Jurisdiction does not and should not depend upon the identity of the party which seeks to appeal. Nor should jurisdiction depend upon which circuit considers the appeal. This Court should grant a writ of certiorari to resolve these conflicts between the circuits.

Respectfully submitted,

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Appendix I

In The

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 78-1520

In the Matter of THE SPECIAL FEBRUARY 1977 GRAND JURY.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Appeal of UNITED STATES OF AMERICA	No. 77-GJ-466
	James B. Parsons, *Chief Judge*

ARGUED JUNE 12, 1978 — DECIDED AUGUST 11, 1978

Before FAIRCHILD, *Chief Judge*, SPRECHER and BAUER, *Circuit Judges.*

BAUER, *Circuit Judge.* At issue in this appeal is whether the district court abused its discretion in denying the Government's motion to disqualify Robert L. Tucker from representing multiple witnesses in a federal grand jury proceeding. For the reasons noted below we affirm.

I.

At the outset we are confronted with the question of whether this Court has jurisdiction to review an order of the district court denying a motion to disqualify an attorney in the course of a federal grand jury proceeding. We begin by noting that such an order is appealable only if it falls within the "collateral order" exception to the final judgment rule of 28 U.S.C. § 1291. As articulated by the Supreme Court, the "collateral order" doctrine applies to a small class of decisions which

> "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949).

This court and several other circuits have applied the "collateral order" doctrine to orders granting and denying disqualification motions in the context of a civil trial. *See*, e. g., *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977); *Schloetter v. Railoc of Ind., Inc.*, 546 F.2d 706 (7th Cir. 1976); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974); *Greene v. Singer Co.*, 509 F.2d 750 (3d Cir. 1971), *cert. denied*, 409 U.S. 848, 93 S.Ct. 54, 34 L.Ed.2d 89 (1972); *Tomlinson v. Florida Iron & Metal Co.*, 291 F.2d 333 (5th Cir. 1961). Moreover, at least four circuits have held that orders *granting* a disqualification motion in a grand jury setting are appealable under *Cohen*. *See In re Investigation Before the February, 1977 Lynchburg Grand Jury*, 563 F.2d 652 (4th Cir. 1977); *In re Gopman*, 531 F.2d 262 (5th Cir. 1976); *In re Investigation Before the April 1975 Grand Jury*, 174 U.S.App.D.C. 268, 531 F.2d 600 (1976); *In the Matter of the Grand Jury Empaneled January 21, 1975*, 536

F.2d 1009 (3d Cir. 1976). It appears, however, that no circuit has yet decided whether an order *denying* a disqualification motion in a *grand jury setting* falls within the "collateral order" exception.

It is our conclusion that such a denial must be viewed as a final order that implicates important rights which would be irretrievably lost if review were denied. *In re Investigation Before the February, 1977 Lynchburg Grand Jury*, 563 F.2d 652, 655 (4th Cir. 1977). We note first in this connection that such an order would not merge in a final judgment, since there is no criminal action pending before the district court. Second, as to the rights at stake, it seems clear that a conflict of interests such as the one alleged in this case poses a substantial threat to the "public's right to the proper functioning of a grand jury investigation." *In re Lynchburg Grand Jury, supra* at 655. For one thing, such a conflict represents a serious ethical impropriety, and thus impugns the integrity of the entire proceeding. Perhaps more importantly, however, an attorney who represents multiple grand jury witnesses with conflicting interests threatens to impede the grand jury's investigative function by depriving it of the full testimony of witnesses—that is, by counseling some clients to pursue a course of action that does not adversely impact on the conflicting interests of others. In this sense, then, the conflict of interests "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws." *United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1972).

While acknowledging that the public's right to the proper functioning of a grand jury is implicated by a conflict of interests situation, the appellee insists that the Government does not have standing to vindicate that right on appeal. We cannot agree. In the first place, it seems clear that the United States Attorney has standing to call

the district court's attention to a possible ethical violation concerning the grand jury proceeding:

> "When an attorney discovers a possible ethical violation concerning a matter before a court, he is not only authorized but is in fact obligated to bring the problem to that court's attention. Nor is there any reason why that duty should not operate when, as in the present case, a lawyer is directing the court's attention to the conduct of opposing counsel. In fact, a lawyer's adversary will often be in the best position to discover unethical behavior. . . . Appellant has failed to persuade us that different rules of standing and jurisdiction should apply when criminal proceedings are in the grand jury stage."

In re Gopman, 531 F.2d 262, 265-66 (5th Cir. 1976) [citations omitted]. In our view, this same rationale operates to confer standing on the Government to appeal the district court's denial of the disqualification motion. Moreover, quite apart from these ethical considerations, the Government has a substantial interest in removing impediments to the grand jury's investigative function. The United States Attorney, after all, is directed by statute to "prosecute for all offenses against the United States" (28 U.S.C. § 547(1)), and, under the Fifth Amendment, any such prosecution must begin with "a presentment or indictment of a Grand Jury."

We conclude therefore that the denial of a disqualification motion in a grand jury setting falls within the "collateral order" exception of *Cohen*, and that the Government has standing to appeal such a denial.

II.

In addressing the merits of the appeal, we begin by noting our agreement with the Government's position that, in the context of a grand jury proceeding, a disqualification motion *may* be granted without proof of the existence of an

actual conflict of interest. That is, when the possibility of a conflict becomes great enough, the court may, in the proper exercise of its discretion, move to " 'nip any potential conflict of interest in the bud' " by granting a disqualification motion. *In re Gopman, supra* at 266.

The question before us in this appeal, however, is whether the lower court abused its discretion by denying the disqualification motion. In this connection, the Government invites us to adopt what amounts to a *per se* rule — namely, the existence of a *potential* conflict of interests *requires* the district court to grant the disqualification motion. We decline to adopt such an inflexible approach. Rather, we hold that the lower court's exercise of discretion in denying a disqualification motion will not be disturbed on appeal absent a clear showing of either an actual conflict of interests or a grave danger of such a conflict which would impede the proper functioning of the grand jury.

On the record before us, we are not persuaded that such a showing has been made in this case. It is true, as the Government points out, that two of Tucker's clients have been immunized. But, significantly, at the hearing that was held on the disqualification motion, there was no testimony or evidence to indicate that these immunized witnesses can incriminate Tucker's other clients. As an added precaution, but not necessary to the instant determination, the district judge apprised all of the witnesses of the potential for a conflict of interests and each indicated a desire to proceed with joint representation. In this light, we cannot agree that the lower court abused its discretion in denying the disqualification motion. The judgment of the lower court is therefore

AFFIRMED.

FAIRCHILD, *Chief Judge*, concurring in part, dissenting in part. Once the merits are reached, I agree with Part II of the opinion. Respectfully, however, I would dismiss the appeal and not reach the merits. I do not agree that the denial of the government's motion is appealable by the government. In my opinion the government has not shown a sufficient interest, separate from the interest of the district court itself.

In a more typical disqualification motion, the movant is attempting to protect himself from an unfair advantage through his adversary's use of counsel who has a conflicting professional duty to movant. If the motion be granted, the adversary is denied the attorney of his choice and the attorney is subjected to a restriction on his practice. If the motion be denied, the movant is subjected to the supposed disadvantage. In any case, an interest of some substance is affected, and if the court's decision be erroneous, the injury cannot be adequately remedied on appeal from the ultimate judgment. Thus the order arguably has *Cohen* finality, and is appealable.

The case before us seems to me to be different. The primary responsibility for conducting the grand jury rests with the court, not the government, and the guardian of the public interest in proper professional conduct is, again, the court and not the government. Surely the government may alert the court to what it considers to be unethical professional conduct, and courts often call upon prosecutors for assistance in presenting such matters for consideration. If another appeals, the prosecution often defends the court's decision. The prosecutor, when acting as the court's delegate, however, has no independent standing to appeal when he differs with the court's own appraisal of the challenged conduct.

The only particularized interest suggested in the present situation is that it will be more difficult for the prosecutor to obtain an indictment if witnesses testify falsely or

remain silent on claim of privilege. Possibly the attorney's conflict in duty may cause him to give improper advice. One or more witnesses may commit perjury, or may remain silent without a valid claim of privilege, or conceivably may make a valid claim when such claim is not in his best interest.

It seems to me that the described type of interest is just too tenuous to give a prosecutor the standing, independently of the court, to initiate a proceeding against an attorney or to appeal from the decision of the court that the claim is unfounded.

Appendix II

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1520

IN THE MATTER OF
THE SPECIAL FEBRUARY 1977 GRAND JURY
APPEAL OF: UNITED STATES OF AMERICA

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable James B. Parsons, Chief Judge Presiding.

BRIEF FOR THE UNITED STATES

ALEXANDRA M. KWOKA,
Special Attorney,
U. S. Department of Justice.

ARGUMENT

I

THE ORDER OF THE DISTRICT COURT DENYING THE GOVERNMENT'S MOTION TO DISQUALIFY ROBERT L. TUCKER FROM REPRESENTING MULTIPLE WITNESSES BEFORE THE GRAND JURY IS A FINAL ORDER FOR PURPOSES OF APPELLATE JURISDICTION.

The District Court's order denying the government's motion to disqualify Robert L. Tucker from representing multiple witnesses before the Special February 1977 Grand Jury is conclusive as to Mr. Tucker's representation of all of the employees of Finish Line Messenger Service and Mr. Lucky's Messenger Service who may be called to testify before the grand jury and determines claims of right which would be irreparably lost if review were denied. The order, therefore, is a final decision within the meaning of Title 28, United States Code, Section 1291.[7]

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the threshold question before the Supreme Court was whether the District Court's order refusing to apply a state statute was appealable under 28 U.S.C. § 1291.[8] The Supreme Court concluded that the District

[7] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

[8] Concerning 28 U.S.C. §§ 1291 and 1292, the court stated:

> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete . . . . So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal.
>
> Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge.

337 U.S. at 546.

Court's order was appealable because it was a final disposition of a claimed right which was not an ingredient of the cause of action and did not require consideration with it. The Court reasoned:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

337 U.S. at 546.

This court has not addressed the issue of whether or not an order granting or denying a motion to disqualify an attorney, in the context of a grand jury proceeding, is appealable. Those circuits which have had the issue presented to them have determined that there is appellate jurisdiction to review an order of the District Court granting a motion to disqualify an attorney.[9] In *Yablonski v. United Mine Workers of America*, 448 F.2d 1175 (D.C. Cir. 1971), *cert. denied* 406 U.S. 906, and 454 F.2d 1036

[9] In re Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976). Matter of Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976). In re Investigation Before February 1977 Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977). In re Gopman, 531 F.2d 262 (5th Cir. 1976).

In Matter of Grand Jury Empaneled January 21, 1975 the court stated:

> If anything, the argument for appellate jurisdiction in circumstances such as these is stronger than that in an arguable *Cohen* situation. Here, there is as yet no "case" in the usual sense of the word to which the order may be deemed collateral – no "case" of which there will be eventual, albeit deferred, review.

536 F.2d at 1011, fn. 1.

(D.C. Cir. 1971) the Court of Appeals for the Washington, D. C. Circuit held that it had jurisdiction to review the District Court order denying a motion to disqualify an attorney.

Applying the standard enunciated in *Cohen*, the District Court's order is appealable. The decision of the District Court is final as to Mr. Tucker's claim that he may represent multiple witnesses before the grand jury. Robert L. Tucker, as a result of the court's ruling, may represent each and every employee of Finish Line Messenger Service and Mr. Lucky's Messenger Service who is called to testify before the grand jury regardless of whether they are in a position to testify concerning the conduct of each other. The decision of the District Court is final as to the government's claim that the representation of immunized and non-immunized witnesses before a grand jury is improper. As a result of the court's ruling any attorney in the Northern District of Illinois may represent both immunized and non-immunized witnesses before the grand jury. Further, the decision is not one which will merge in a final judgment, as there is no criminal action pending before the District Court.

Supreme Court, U. S.
FILED
FEB 9 1979
MICHAEL RODAK, JR., CLERK

No. 78-739

In the Supreme Court of the United States

OCTOBER TERM, 1978

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Moore's Federal Practice (2d ed. 1973) 11
S. Rep. No. 95-354, 95th Cong., 1st Sess. (1977) 18, 19, 20

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-739

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the district court (Pet. App. D1-D17) is not reported. The original panel opinion of the court of appeals (Pet. App. C1-C24) is reported at 573 F.2d 936. The opinion of the court of appeals on rehearing *en banc* (Pet. App. B1-B44) is reported at 584 F.2d 1366.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on September 7, 1978 (Pet. App. B1). By

order of Mr. Justice Stewart dated September 27, 1978, the time for filing a petition for a writ of certiorari was extended until November 6, 1978. The petition was filed on November 3, 1978. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a district court order refusing to disqualify an Internal Revenue Service attorney appointed under the authority of the Attorney General to represent the government in a grand jury criminal tax investigation is reviewable by a court of appeals as an order in a "civil action" under 28 U.S.C. 1292(b).

2. Whether such an order is a final decision of the district court appealable to the court of appeals under 28 U.S.C. 1291.

3. Whether an attorney employed by the Internal Revenue Service may be appointed as a special attorney under the authority of the Attorney General to assist in the representation of the government in a grand jury criminal tax investigation.

STATEMENT

1. In December 1977, based upon evidence gathered during an investigation of petitioner, special agents of the Intelligence Division of the Internal Revenue Service recommended to the Regional Counsel, Internal Revenue Service, Central Region, that a grand jury investigation be instituted to consider whether petitioner had committed criminal violations of the internal revenue laws. Upon receipt of the

recommendation, the Regional Counsel assigned the matter to one of his staff attorneys, Meno W. Piliaris. After reviewing the evidence obtained up to that time, Piliaris prepared a letter advising the Department of Justice that sufficient evidence existed to warrant criminal investigation by a grand jury (Pet. App. C2-C3). Upon independent consideration of the Internal Revenue Service's recommendation, the Department of Justice approved the commencement of a grand jury investigation of petitioner. In April 1977, a grand jury was empanelled in the United States District Court for the Eastern District of Michigan (Pet. App. B2).

2. The Acting Assistant Attorney General in charge of the Tax Division of the Department of Justice assigned two attorneys to conduct the investigation. Recognizing that the investigation would involve complex tax matters and numerous exhibits, the Tax Division attorneys requested the assistance of Piliaris, who is an experienced tax attorney and a certified public accountant and who was somewhat familiar with the proposed criminal investigation (R. 174, 239).[1] Thereafter, pursuant to the authority of 28 U.S.C. 515 and 543, Acting Associate Attorney General Philip H. Modlin appointed Piliaris to be a special attorney, empowered to assist the two Justice Department attorneys in the conduct of the grand jury investigation (Pet. App. G1). Piliaris thereupon took the oath of office as a special attorney

[1] "R." refers to the record appendix filed in the court of appeals.

before the Chief Judge of the United States District Court for the Eastern District of Michigan (R. 176). After his appointment, Piliaris continued to be employed and paid by the Internal Revenue Service. He was, however, aware of the need to preserve grand jury secrecy. As a result, Piliaris was instrumental in setting up procedures in this case to avoid improper disclosures of grand jury evidence by Internal Revenue agents (R. 106-108). As an additional precaution, the government removed Piliaris from any participation in civil tax matters concerning petitioner (R. 212-214).

3. Following receipt of the initial round of grand jury subpoenas, petitioner moved to quash the subpoenas and for protective orders, charging abuses of the grand jury's process (Pet. App. D3, D16-D17). In one of its motions for a protective order, petitioner challenged the appointment and presence in the grand jury room of Special Attorney Piliaris. The district court denied petitioner's motions to quash the subpoenas and to bar Piliaris from participating in the investigation (Pet. App. D16).

Petitioner sought immediate review of the district court's order under 28 U.S.C. 1291 and further requested the district court to certify interlocutory appeals of each order under 28 U.S.C. 1292(b) (Pet. App. B2). The district court agreed to certify an appeal under 28 U.S.C. 1292(b) with respect to the Piliaris matter (Pet. App. E1-E3), but it refused

to certify appeals of the other orders.[2] The court of appeals granted petitioner's request under 28 U.S.C. 1292(b) for permission to appeal the question of Piliaris' participation in the grand jury investigation. However, it dismissed petitioner's 28 U.S.C. 1291 appeal for lack of jurisdiction (Pet. App. F1-F2). A divided panel of the court of appeals subsequently agreed that it had jurisdiction to hear an interlocutory appeal of the order refusing to disqualify Piliaris. On the merits, it reversed the district court's order and ordered the grand jury investigation terminated (Pet. App. C1-C15). The dissenting judge concluded that the district court's order was not reviewable under the Interlocutory Appeals Act, or as a final decision under 28 U.S.C. 1291, or on mandamus (Pet. App. C17-C20). He further expressed the view that Piliaris' status as an Internal Revenue Service employee did not require his disqualification or the termination of the grand jury investigation (Pet. App. C20-C24).

On the government's motion, the court of appeals vacated the panel decision and ordered rehearing *en banc*. Thereafter, by a 5-2 vote, the court of appeals held that the district court's order was not review-

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[2] The district court refused to certify under 28 U.S.C. 1292(b) two other orders: (1) an order denying petitioner's motion to quash grand jury subpoenas (Pet. App. D3); and (2) an order granting, in part, petitioner's motion for a protective order but permitting the use of some Internal Revenue Service personnel upon the government's *ex parte* showing of need for each individual (Pet. App. D3, D10). Petitioner subsequently complied with the grand jury subpoenas.

able as an interlocutory appeal under 28 U.S.C. 1292 (b) because the statute is limited to orders entered in civil actions. As the court observed, "it seems self-evident that a grand jury investigation of possible criminal tax violations should not be characterized as a 'civil action' under § 1292(b) and that we lack jurisdiction under the Interlocutory Appeals Act" (Pet. App. B4). The *en banc* court therefore ruled that the panel's original certification of the appeal under 28 U.S.C. 1292(b) was improvidently granted and it dismissed the appeal (Pet. App. B1-B8).

In a separate concurring opinion, two judges expressed the view that the appointment, under the authority of the Attorney General, of a federal attorney assigned to the Internal Revenue Service to assist in a criminal tax investigation through grand jury proceedings was not an abuse of the grand jury process that called for the issuance of a writ of mandamus (Pet. App. B9-B12).

The dissenting judges concluded that the court of appeals had jurisdiction to consider the appeal and that the IRS attorney should not have been permitted to assist in the grand jury investigation (Pet. App. B13-B34).[3]

[3] Petitioner correctly states (Pet. 7) that the grand jury term has expired. The Department of Justice, however, is actively considering whether to continue the investigation, and it is possible that the case will be presented to a successor grand jury.

ARGUMENT

1. Petitioner argues (Pet. 8-12) that the court of appeals erred in holding that it lacked jurisdiction to hear petitioner's interlocutory appeal under 28 U.S.C. 1292(b) because the district court's order was not entered in a "civil action." The Court need not consider the propriety of this ruling, however, because, even assuming that a grand jury investigation could be characterized as a "civil action" within the meaning of Section 1292(b), the court of appeals properly exercised its discretion under the statute to dismiss the appeal on the ground that the resolution of the issue would not " 'materially advance the ultimate termination of the litigation' " (see Pet. App. B5). As the court observed, "[t]o allow an appeal when the District Court has refused to disqualify a government lawyer from a grand jury investigation simply disrupts the investigation and creates the possibility that the target of the inquiry—by the threat of delay and protracted legal maneuvering—will exert unwarranted influence in the government's choice of its prosecuting attorney" (Pet. App. B5-B6).[4] This Court has repeatedly rejected similar at-

[4] *United States* v. *Calandra*, 455 F.2d 750, 752-753 (6th Cir. 1972), rev'd on other grounds, 414 U.S. 338 (1974), and *United States* v. *Neiberger*, 460 F.2d 290, 292 (6th Cir. 1972), upon which petitioner relies (Pet. 9), are not to the contrary. Neither case involved the certification of an appeal under Section 1292(b) or the question of what constitutes a "civil action" under that provision. In *Calandra*, the court held that the government could appeal from an order granting a grand jury target's pre-indictment motion to suppress evi-

tempts by targets of grand juries to take multiple "piecemeal" appeals that would result in the "protracted interruption of grand jury proceedings" (*Gelbard* v. *United States*, 408 U.S. 41, 70 (1972) (White, J., concurring)) and thereby provide an "[o]pportunity for obstructing the 'orderly progress' of investigation." *Cobbledick* v. *United States*, 309 U.S. 323, 325, 327 (1940). See also *United States* v. *Ryan*, 402 U.S. 530, 532-533 (1971); *United States* v. *Dionisio*, 410 U.S. 1, 16-18 (1973). Here, petitioner possesses adequate appellate remedies at an appropriate point in the proceedings after indictment and conviction or on appeal from a contempt citation for review of its claim that the IRS attorney should not have participated in the grand jury investigation. Accordingly, the court of appeals correctly refused to

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dence and to return property. There, the court rejected the contention that the statutory basis for jurisdiction (18 U.S.C. 3731) authorizes an appeal by the government from a suppression order only in a criminal case and that the motion was not filed in a criminal case. In so holding, the court observed that "[a] Grand Jury investigation might well be regarded as a criminal proceeding, particularly by the person who is the subject of it" (455 F.2d at 752).

Neiberger is likewise distinguishable. In that case, the court held that a district court's order refusing to grant immunity to two grand jury witnesses in a proceeding instituted under 18 U.S.C. (1964 ed.) 2514 was a final decision in a civil action that was reviewable on appeal. The immunity statute involved in that case has since been repealed by the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 930. In any event, to the extent that *Neiberger* suggests that an order entered during the course of a grand jury proceeding is appealable under 28 U.S.C. 1292(b), it has been overruled by the *en banc* decision in this case.

accept jurisdiction under Section 1292(b) at this preliminary stage of the case.

2. Contrary to petitioner's contention (Pet. 9), the decision below does not conflict with either *Matter of Grand Jury Impaneled January 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *In re Grand Jury Subpoena Served on John Doe*, 546 F.2d 498 (2d Cir. 1976); or *In re Grand Jury Proceedings*, 580 F.2d 13 (1st Cir. 1978). In the first case, the court reviewed an order of the district court denying a motion to quash a grand jury subpoena directed to the custodian of records of a person under investigation. Although the district court certified on request of the custodian the order to the court of appeals under 28 U.S.C. 1292(b), and the Third Circuit granted the custodian's petition to appeal ~~from~~ under that provision (see 541 F.2d at 376), it did so without any discussion of the question presented here—whether a grand jury proceeding is a "civil action" under that provision. The only explicit ruling with respect to jurisdiction in that case is the holding of the court of appeals on the appeal of the person under investigation that it had jurisdiction to review the district's order as an appeal as a matter of right from a "final decision" of the district court under 28 U.S.C. 1291 (see 541 F.2d at 377 n.4).[5]

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[5] *In re Grand Jury Subpoena Served on John Doe, supra*, and *In re Grand Jury Proceedings, supra*, are not to the contrary but in fact support the decision below. In the former case, the Second Circuit dismissed an appeal from an order of the district court refusing to enjoin a grand jury investigation. In so holding, the court stated that it did not have

There is, moreover, no conflict between the decision below and the Third Circuit with respect to jurisdiction under 28 U.S.C. 1291.[6] The court below correctly concluded that the district court's order refusing to disqualify the IRS attorney was not a "final decision" appealable as a matter of right under Section 1291 (see Pet. App. B6-B7). Unlike the situation considered by the Third Circuit in *Matter of Grand Jury Impaneled January 21, 1975, supra*, the court here properly pointed out that petitioner would be able to raise the disqualification of counsel issue after indictment and conviction or on appeal from a contempt citation. In the Third Circuit case, by contrast, the district court's order upheld a subpoena directing a third party to produce records that were the property of a person under investigation and that he claimed were immune from production. In that special situation, this Court has held that denial of immediate review would render the owner of the records "powerless to avert the mischief of the order" (*Perlman* v. *United States*, 247 U.S. 7, 13 (1918)) "for the custodian could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review." *United States* v. *Ryan*, 402 U.S. 530, 533 (1971). See also *United States* v. *Nixon*, 418 U.S. 683, 691 (1974). There is accordingly no conflict between the decision below and the Third Circuit with respect to jurisdiction under Section 1291.

jurisdiction under Section 1292(b) because the district court had not certified its order and the appellants did not request that it do so. Similarly, in the latter case, the First Circuit held that an order denying a petition for disclosure of grand jury materials was not appealable as a final order under Section 1291.

[6] Originally, an administrative panel of the court of appeals dismissed petitioner's appeal under Section 1291 in the same order that certified the Section 1292(b) appeal (Pet. App. F1-F2). Petitioner did not appeal that dismissal. However, since the *en banc* court rejected the Section 1292(b) appeal, it reached the question of appealability under Section 1291 "as a matter of fairness" (Pet. App. B6).

3. a. Petitioner likewise errs in contending (Pet. 13-14) that the court of appeals had jurisdiction under the collateral order doctrine in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). There, the Court held that an appeal could be taken under Section 1291 from an order of a district court denying a corporation's motion that the plaintiff in a stockholder's derivative suit be required, pursuant to a state statute, to give security for reasonable expenses of the defendants. In so ruling, the Court concluded that "[t]his decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (*id.* at 546). As Professor Moore has stated, there are three requirements for appellate jurisdiction under the collateral order doctrine (*Federal Practice* ¶ 110.10, at 133 (2d ed. 1973)):

> (1) the order must be a final determination of a claim of right "separable from, and collateral to," rights asserted in the action; (2) it must

> be "too important to be denied review," in the sense that it "presents a serious and unsettled question"; and (3) its review cannot, in the nature of the question that it presents, await final judgment because "when that time comes, it will be too late effectively to review the * * * order and rights conferred * * * will have been lost, probably irreparably."

See *Abney* v. *United States*, 431 U.S. 651, 658 (1977).

Here, as the court of appeals correctly concluded, petitioner can raise the disqualification of counsel issue after indictment and conviction or on appeal from a contempt citation for refusing to obey grand jury subpoenas. Thus, even on the assumption that the district court's order is collateral and presents an important unsettled question, it can await consideration in the course of the normal appellate process. "These are the usual remedies, and they are adequate" (Pet. App. B5). The propriety of the IRS attorney's participation in the grand jury investigation will merge into the question of the validity of any ensuing indictment (see, *e.g.*, *Latham* v. *United States*, 226 F. 420 (5th Cir. 1915); *United States* v. *Dondich*, 460 F. Supp. 849 (N.D. Cal. 1978)) and therefore " 'remains open, unfinished [and] inconclusive' until the trial court has pronounced judgment." *United States* v. *MacDonald*, 435 U.S. 850, 859 (1978). "That a grand jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue." *Cobbledick* v. *United States*, *supra*, 309 U.S. at 327-328. "Whatever right

* * * [petitioner] may have requires no further protection * * * than that afforded by the district court * * *" until a finding of contempt for refusing to comply with grand jury subpoenas (see *In re Perlin*, No. 78-2139 (7th Cir. Oct. 4, 1978), slip op. 5, or a criminal conviction is entered (*United States* v. *Dondich*, *supra*). See *Cobbledick* v. *United States*, *supra*, 309 U.S. at 328. In sum, the disqualification of counsel issue is not one that will be "destroyed if it were not vindicated before trial" (*United States* v. *MacDonald*, *supra*, 435 U.S. at 860) but "is subject to effective review after final judgment * * *" (*Coopers & Lybrand* v. *Livesay*, No. 76-1836 (June 21, 1978), slip op. 5). There is accordingly no basis for interlocutory appellate jurisdiction under the collateral order doctrine.[7]

b. In support of its claim that the court of appeals should have considered the attorney disqualification question as a "final decision" under Section 1291,

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[7] Petitioner also contends (Pet. 15-16) that the court of appeals erred in refusing mandamus and in not directing the district court to exclude Piliaris from participating in the grand jury proceeding. But petitioner never filed a petition for mandamus (Pet. App. B3 n.2). At all events, the court correctly noted that petitioner possesses adequate appellate remedies (Pet. App. B5) (see *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976)). Mandamus would therefore be inappropriate (see *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30 (1943)). Indeed, as the concurring judges concluded, the record in this case "demonstrates no 'exceptional condition,' no 'clear abuse of judicial discretion' or failure to exercise jurisdiction on the part of the District Judge and no denial of appellate review" (Pet. App. B12). See *Will* v. *Calvert Fire Ins. Co.*, No. 77-693 (June 23, 1978), slip op. 4-6.

petitioner further asserts (Pet. 13) the existence of a "general rule" prevailing in eight circuits that "all orders relating to attorney disqualification, whether disqualifying the attorney or allowing him to proceed, are always immediately appealable." In a supplemental memorandum, petitioner cites two recent decisions of the First and Seventh Circuits as evidence that (p. 6) "[t]he circuits are in hopeless disagreement as to their jurisdiction to hear appeals from orders respecting motions to disqualifying [sic] counsel in a grand jury setting * * *."

Contrary to petitioner's contention, there is no such "general rule." The decisions petitioner cites upholding the appealability of orders granting or denying disqualification motions are civil cases[8] in which the settled policy against interruption of a grand jury inquiry was not implicated. Moreover, for purposes of determining appealability under Section 1291, an order disqualifying [sic] counsel in a grand jury proceeding is distinguishable from one (as in the instant case) refusing to disqualify counsel. The decisions holding appealable orders disqualifying counsel have emphasized the fact that such orders are final and conclusive as to the particular attorney's representation and that they accordingly involve an important right that might be irretrievably lost if immediate review were denied. See *In re Investigation Before the February, 1977, Lynchburg Grand Jury*, 563 F.2d 652, 655 (4th Cir. 1977). See also *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977); *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976); *In re Gopman*, 531 F.2d 262 (5th Cir. 1976); *In the Matter of the Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009 (3d Cir. 1976). Contra: *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978).

[8] See Pet. 13 n.16, Pet. 14 n.18, and *Melamed* v. *ITT Continental Baking Co.*, 534 F.2d 82 (6th Cir. 1976); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800, 805 (2d Cir. 1974) (*en banc*). Cf. *Community Broadcasting of Boston, Inc.* v. *FCC*, 546 F.2d 1022 (D.C. Cir. 1976).

Here, on the other hand, the district court's order refusing to disqualify the IRS lawyer does not "involve[] an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States* v. *MacDonald*, *supra*, 435 U.S. at 860. Indeed, as we have pointed out above (see pages 8, 10, *supra*), petitioner need not submit to trial and conviction before raising its claim but can obtain expeditious review of its disqualification claim by appealing a contempt citation after refusing to comply with a grand jury subpoena. Thus, the court of appeals correctly held that this case does not fall within "the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims * * *" (*United States* v. *Ryan*, *supra*, 402 U.S. at 533) so as to justify interruption of a grand jury proceeding.

Finally, petitioner errs in characterizing the circuits as in disagreement on the question presented in this case. While the First Circuit in *In re Benjamin*, *supra*, has refused to follow the decisions of five courts of appeals holding that an order disqualifying

an attorney from representing the subject of a grand jury investigation is appealable, no circuit has held that the particular order at issue here—refusing to disqualify a government attorney from a grand jury proceeding—is appealable.[9] There is accordingly no conflict of decisions requiring resolution by this Court.

4. Given the absence of jurisdiction to consider petitioner's appeal at this stage of the proceeding, the court of appeals properly refrained from reaching the merits of its argument that the IRS attorney should have been disqualified from assisting in the grand jury investigation. It is apparent, however, that petitioner's disqualification claim is similarly without merit. Petitioner contends (Pet. 16-23) that the Attorney General has no power to appoint an attorney employed by the Internal Revenue Service to appear as an "attorney for the government" (Fed. R. Crim. P. 54(c)) before a grand jury investigat-

[9] Contrary to petitioner's argument (Supp. Mem. 2-4), *In re Special February 1977 Grand Jury*, 581 F.2d 1262 (7th Cir. 1978), does not conflict with the decision below. There, the court held appealable an order denying a government motion to disqualify an attorney from representing multiple witnesses in a grand jury proceeding. But the government could not have appealed the grand jury's failure to indict. And given the government's limited post-indictment appeal remedies in criminal cases, the government could have obtained review of the district court's order only by an immediate interlocutory appeal. Thus, unlike the instant case, denial of immediate review would have rendered impossible any review. Cf. *In re Grand Jury Investigation*, 576 F.2d 1071, 1072 (3d Cir. 1978) (appeal by government of orders denying disqualification on the ground that the orders were not ripe for judicial intervention dismissed as premature), cert. denied, No. 77-1868 (November 6, 1978).

ing possible tax crimes. In its view (Pet. 17), "[o]nly Justice Department attorneys may conduct grand jury investigations and criminal litigation."

But the Attorney General has specific statutory authority to "appoint attorneys to assist United States attorneys * * *" (28 U.S.C. 543), who "may * * * conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings * * *" (28 U.S.C. 515(a)). The purpose of these provisions is to permit the Attorney General to utilize the special skills and expertise of attorneys outside of the Justice Department (H.R. Rep. No. 2901, 59th Cong., 1st Sess. (1906)), and nothing in these statutes precludes the Attorney General from obtaining the services of attorneys employed by other government agencies, including the Internal Revenue Service (Pet. App. C8-C9). Indeed, in a recent decision, the Seventh Circuit rejected much the same claim with respect to the appearance before a grand jury of a Commodities Futures Trading Commission attorney who was appointed as a Special Assistant United States Attorney. *In re Perlin, supra.*[10] See also *Coson* v. *United States*, 533 F.2d 1119, 1120-1121 (9th Cir. 1976); *United States* v. *Evans*, 526 F.2d 701, 707 (5th Cir.), cert. denied, 429 U.S. 818 (1976); *United States* v. *Universal Mfg. Co.*, 525

[10] Petitioner's reliance (Pet. 17) upon cases holding that administrative agency attorneys are unauthorized persons in the grand jury room under Fed. R. Crim. P. 6(d) is misplaced. None of those decisions involved agency attorneys specially designated by the Attorney General under 28 U.S.C. 543 to appear before a grand jury. Compare *In re Perlin, supra*, slip op. 12-13.

F.2d 808, 812 (8th Cir. 1975); *United States* v. *Dunham Concrete Products, Inc.*, 475 F.2d 1241, 1249 (5th Cir.), cert. denied, 414 U.S. 832 (1973).

Petitioner further argues (Pet. 19-20) that the presence of agency personnel threatens to breach the secrecy of the grand jury. But Rule 6(e) of the Federal Rules of Criminal Procedure provides sufficient safeguards against the improper disclosure of grand jury matters by empowering the courts to punish knowing violations as contempt. S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977). See, *e.g.*, *In re Grand Jury Subpoenas, April 1978, at Baltimore*, 581 F.2d 1103, 1110 (4th Cir. 1978), petition for a writ of certiorari pending (No. 78-1055); *In re Special March 1974 Grand Jury*, 541 F.2d 166, 170 (7th Cir. 1976), cert. denied, 430 U.S. 929 (1977); *United States* v. *Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966). As we noted above, Piliaris is fully aware of his obligations in this regard, and petitioner has offered nothing to suggest he will not honor them.[11]

[11] Petitioner complains (Pet. 19) that the Internal Reevnue Service Regional Counsel's grand jury recommendation letter to the Department of Justice contained a paragraph stating that "[a]t the appropriate time" it would ask the Justice Department to seek "an order * * * from the Court authorizing the disclosure of grand jury information to IRS under the provisions of Rule 6(e)" (Pet. App. D7). But not all civil disclosure of grand jury evidence to administrative agencies is unlawful. See, *e.g.*, *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958); *In re Grand Jury Subpoenas, April, 1978, at Baltimore, supra*, 581 F.2d at 1109-1110. Here, the district court found that the grand jury investigation was being conducted for a proper criminal purpose (Pet. App. D6) and that there was "no evidence that the Justice Department in this case plans or intends to use the grand jury subpoenas to gather evidence not relating to its criminal investigation" (Pet. App. D7-D8). Indeed, the Internal Revenue Service's apparent intention to obtain *judicially supervised* disclosure of grand jury matters for civil law enforcement purposes was contemplated by Congress in its recent revision of Rule 6(e). See Fed. R. Crim. P. 6(e)(2)(C)(i); S. Rep. No. 95-354, *supra*, at 6, 8. There is nothing in the record to suggest that the government, if it does seek civil disclosure of grand jury evidence, intends to circumvent the limitations of Rule 6(e).

At all events, the mere possibility of improper civil use of grand jury evidence does not justify impeding an ongoing criminal investigation; "[c]ivil misuse can be raised in subsequent civil proceedings." S. Rep. No. 95-354, *supra*, at 7 n.12. See, *e.g.*, *In re Grand Jury Subpoenas, April, 1978 at Baltimore, supra*, 581 F.2d at 1110 n.16; *In re Special March 1974 Grand Jury, supra*, 541 F.2d at 170, 172; *In re Grand Jury Proceeding*, 528 F.2d 983, 984 (5th Cir. 1976); *Witte* v. *United States*, 544 F.2d 1026, 1029 (9th Cir. 1976); *Coson* v. *United States, supra*, 533 F.2d at 1120.

Finally, contrary to petitioner's assertion (Pet. 20-21), the fact that Piliaris is an Internal Revenue Service employee detailed to the Department of Justice does not create an inherent conflict of interest requiring his disqualification. At all times, Piliaris served a single client—the United States—and there is no question of misuse of attorney-client confidences (Canon 4, *ABA Code of Profcssional Responsibility*) or of conflicting allegiances that would impair his independent professional judgment (Canon 5, *ABA Code of Professional Responsibility*). *In re Perlin*, *supra*, slip op. 7-9. Piliaris' participation in the grand jury investigation after having recommended the investigation no more threatens to undermine the fun-

damental fairness or independence of the grand jury than permitting a similarly-situated Assistant United States Attorney to conduct a grand jury investigation. *Id.* at 9-10; *United States* v. *Dondich*, *supra*, 460 F. Supp. at 857. See also H.R. Rep. No. 2901, *supra*. As the Seventh Circuit observed in terms equally appropriate to this case, "A *per se* rule against the use of agency attorneys to conduct grand jury investigations [as posited by the petitioner] would be an act of needless caution and would erect just such barriers between the facets of the criminal justice system as Congress intended to avoid." *In re Perlin*, *supra*, slip op. 13-14, citing *United States* v. *LaSalle National Bank*, No. 77-365 (June 19, 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

I

The government's brief in opposition ignores the central fact of this case: the grand jury proceeding was not delayed or interrupted by the certification and acceptance of the appeal under 28 U.S.C. § 1292(b). Not until a panel of the Sixth Circuit held that the proceeding was unlawful was the investigation interrupted, and that interruption was the result of the government's voluntary decision to suspend the grand jury, not the result of any motion or other action of General Motors Corporation.

The cases cited by the government for the proposition that grand jury orders are not appealable, and the dictum of the Sixth Circuit majority that "we do not believe that resolution of this issue at this time would 'materially advance the ultimate termination of the litigation'" (Pet. B-5), both rest upon the proposition that appeals should not be permitted to delay or obstruct a grand jury investigation. The proposition may have validity, but it has no applicability to this case.

The fact is that allowing § 1292(b) appeals from orders in grand jury proceedings, where the district court has certified that an immediate appeal would materially advance the litigation, is *less* likely to obstruct or delay the grand jury investigation than holding that such orders are not subject to § 1292(b) appeals.

This fact is illustrated by the government's own argument that an "adequate appellate remedy" exists in that GM can stand in contempt of court to get an appeal.

While an appeal under § 1292(b) does not delay the grand jury proceedings, standing in contempt completely halts the grand jury investigation while the contempt citation is litigated and appealed. If GM had stood in contempt on July 6, 1977 to protest the presence of an IRS employee in the grand jury room, the grand jury would have been suspended for months while the courts wrestled with the important legal issue involved here. Instead, GM complied with the subpoenas returnable on July 6 and took an appeal by obtaining a § 1292(b) certification from the district court. The grand jury conducted its investigation during the pendency of the appeal.

If the government were truly concerned about delay, it would have to concede that § 1292(b) is a far superior appellate remedy to standing in contempt.

Missing from the government's brief is any response to GM's citation of authority from other courts of appeals and from this Court supporting the proposition that this case is reviewable as a "civil action" under § 1292(b). Section 1292(b) provides a useful safety valve for review of difficult legal questions arising early in a lengthy grand jury proceeding. For the reasons stated by GM in its petition (pages 10-11) and recognized by the Courts of Appeals, of the First, Second and Third Circuits, this Court should resolve the essential conflict between the circuits by granting the petition for certiorari and should examine the important question whether a discretionary appeal under § 1292(b) is the most effective manner of resolving substantial questions in grand jury proceedings without interrupting the grand jury investigation.

II

The government's assertion that the decision below does not conflict with decisions in the First, Second and Third Circuits is simply not supported by the language of the decisions. The First Circuit said: "the Government could either have sought the cooperation of the district court in certifying this question under § 1292(b), or if it felt that circumstances warranted, go into contempt in order to obtain appellate review." *In re Grand Jury Proceedings*, 580 F.2d 13, 17 (1st Cir. 1978). The Second Circuit said: "This is precisely the sort of case in which we would want the district court's judgment that there is a controlling question of law on which 'an immediate appeal . . . may materially advance the ultimate termination of the litigation.' 28 U.S.C. § 1292(b)." *In re Grand Jury Subpoena Served on John Doe*, 546 F.2d 498, 501-02 (2d Cir. 1976). The Third Circuit, as the government concedes in its brief, accepted the custodian's petition to appeal under § 1292(b) in *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373, 376 (3d Cir. 1976). Thus,

the present state of the law appears to be that § 1292(b) certifications will be available for the review of interlocutory matters of sufficient importance in grand jury proceedings in the First, Second, and Third Circuits, but not (unless the decision below is reviewed and reversed by this Court) in the Sixth Circuit.

III

The government argues that the district court's refusal to disqualify Mr. Piliaris from participating in the grand jury proceeding cannot be appealed under § 1291 because it can always be reviewed on appeal from some hypothetical later proceeding. This argument was also raised and emphatically rejected in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800, 805 (2d Cir. 1974) (en banc); see GM's petition at 14. In fact, the D.C. Circuit has suggested that an immediate appeal from an order denying disqualification is more appropriate in a grand jury setting than in a civil case; see GM's petition at 12, footnote 12.

The government asserts that it may take an appeal from an order denying disqualification of counsel in a grand jury proceeding, but a private party may not. This dual standard offends elementary principles of fairness. The right not to be subjected to any legal proceeding conducted by an attorney with a conflict of interest does not belong to the government alone. Such right is entirely independent of the ultimate outcome of the legal proceeding, and therefore cannot be vindicated on appellate review of a judgment. *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 607 (8th Cir. 1977). The Sixth Circuit recently admitted that its present position denying immediate review under § 1291 of orders denying disqualification is the minority view and contrary to the holdings of seven other circuits. *Melamed v. ITT Continental Baking Co.*, 1979-1 Trade Cases (CCH) ¶ 62,433 (6th Cir. 1979), overruling prior decision reported at 534 F.2d 82 (6th Cir. 1976). The predominant view among the circuits is that the existence of a possible future avenue of appeal is an insufficient appellate remedy for an erroneous order refusing to disqualify an attorney who has a conflict of interest. The conflict presented by the decision below should be resolved by this Court.

IV

The government's final argument is that GM's substantive claim in the Sixth Circuit is without merit. Yet the district court certified the question as worthy of immediate review, a panel of the Sixth Circuit agreed in accepting the appeal, and another panel of the Sixth Circuit reversed the order of the district court on the merits. GM's position on the merits was vindicated until the subsequent decision of the Sixth Circuit that § 1292(b) could not be utilized in appealing orders related to grand jury proceedings.

In support of its position on the merits, the government misstates GM's position. It says (Brief in Opposition p. 16) that Petitioner contends "that the Attorney General has no power to appoint an attorney employed by the Internal Revenue Service to appear as an 'attorney for the government.'" In fact, GM's position as repeatedly stated in its petition is that a court should disqualify from participating in a grand jury investigation of a matter an IRS attorney "with substantial prior agency involvement" in such matter (Pet. 2).

The government does not respond to GM's showing that under the procedural rules of the IRS the extent of IRS participation in a grand jury investigation is determined by the requests of an "attorney for the government" (Pet. 19). The government does not deny that it is its position that the IRS attorney most responsible for an IRS

matter may become, and indeed in many cases should become, an "attorney for the government" in a grand jury investigation of the matter and, under IRS rules, make the requests which will allow an indefinite number of additional IRS personnel to participate in the grand jury investigation. The validity of these procedures, even absent the designation of an IRS attorney as an attorney for the government, has recently been placed before the Court in the petition for certiorari filed in *Fairchild Industries, Inc. v. Harvey*, No. 78-1055, filed December 29, 1978. The panel of the Sixth Circuit which first heard the matter was right in holding that the procedure used by the government in this case constitutes a "grand jury abuse" which this Court should correct.

For these reasons, and the reasons stated in GM's petition, this Court should issue a writ of certiorari in this case.

Respectfully submitted,

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